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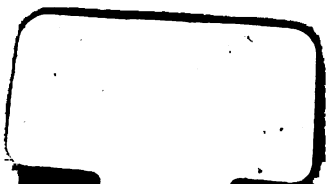

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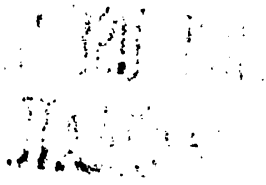

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CASES DECIDED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA

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JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS

RICHARD HENRY CARDWELL, *President*[1]
GEORGE MOFFETT HARRISON, *President*[2]
STAFFORD GORMAN WHITTLE, *President*[3]
JOSEPH LUTHER KELLY
FREDERICK WILMER SIMS
ROBERT RIDDICK PRENTIS[4]
MARTIN PARKS BURKS[5]

ATTORNEY-GENERAL

JOHN GARLAND POLLARD

STATE REPORTER

THOMAS JOHNSON MICHIE

---

[1] Judge Cardwell resigned November 16, 1916.
[2] Judge Harrison was elected President November 16, 1916; resigned March 6, 1917.
[3] Judge Whittle was elected President March 6, 1917.
[4] Judge Prentis took his seat December 16, 1916.
[5] Judge Burks took his seat March 22, 1917.

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RULES OF COURT

I.—*Motions.*

No affidavits shall be read in support of, or opposition to, any motion hereafter made to the court, unless reasonable notice, in writing, be given to the opposing party of the time and place of taking the same; and every motion which is not a motion of course, shall be supported by affidavit.

II.—*Briefs.*

Counsel for the appellant, or plaintiff in error, shall file in the clerk's office fifteen days before the argument of the case begins, a printed brief *containing a concise abstract or statement of the facts of the case,* and presenting succinctly the questions involved and the authorities relied on in support thereof, which brief shall be signed by some counsel practicing in this court. Counsel for the appellee or defendant in error, shall file his brief in the clerk's office at least eight days before the argument of the case begins. *His brief shall be of like character with that required of the appellant or plaintiff in error, except that no statement of the facts of the case shall be necessary unless that presented by the appellant or plaintiff in error is controverted, in which case he shall either restate the facts as he views them, or point out the matters or things controverted, giving reference to the pages of the record bearing on the controverted points. If the brief of counsel for the appellee or defendant in error does not conform to this requirement, the court may, if it deems proper, accept the statement of counsel for the appellant or plaintiff in error as correct.* The reply of the appellant or plaintiff in error

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shall be filed at least two days before the argument begins in which he shall insert all the authorities relied on by him; and no error other than such as shall be pointed out and insisted on in such brief, on the part of the plaintiff or appellant, shall (without leave of the court) be admitted as a ground for argument, on the hearing of the cause. No cause shall be proceeded in without such brief. But a party who has prepared and filed a brief may insist on a hearing when the cause is regularly called, although no brief shall have been filed by his adversary. If one of the parties omits to file such a brief, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the brief is filed. The plaintiff or appellant may adopt the petition as his brief, *provided it contains the statement of facts above required.* If no brief be filed by either party, when a cause is called it shall stand continued until the next term, unless the court shall otherwise order.

Counsel must mail or deliver to opposing counsel a copy of his brief within the prescribed time for filing briefs.

III.—*Attorneys and Arguments.*

When there are two or more counsel on the same side, no one of them shall argue twice, except by leave of the court; nor shall more than two counsel, representing the same interest of one or more party or parties, be permitted to argue for such party or parties.

IV.—*As to Reading Records and Citing Authorities.*

In no case is it necessary or proper to read the record to the court; but counsel may refer thereto, and state what they consider as proved, on which they rely. And in all cases it is recommended to the gentlemen of the bar to select and cite only the most pertinent authorities.

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V.—*Arguments Upon Exceptions to Reports.*

No oral argument will be permitted upon exceptions to a master commissioner's report, except upon naked questions of law, without reference to details of evidence; or upon any motion to advance a cause to the privileged docket; or upon any motion to require new or additional security upon, or to increase the penalty of an appeal or supersedeas bond. Counsel are required to state the grounds for and against such motions in writing.

VI.—*Causes Heard Out of Course.*

No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court, by motion, in writing, after notice of at least two days to the opposite party.

VII.—*Certificates of Judgments, Decrees, Etc.*

No certificate of a judgment or decree of the Court of Appeals shall, without the special direction of the court, be transmitted to any inferior court, in less than sixty days from the rendition thereof, unless the court shall previously have adjourned for one or more weeks.

VIII.—*Consideration of General Error.*

In any appeal, writ of error, or supersedeas, if error is perceived against any appellee or defendant, the court will consider the whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do were the appellee or defendant to bring the same before them, either by appeal, writ of

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error, or supersedeas, unless such error be waived by the appellee or defendant, which waiver shall be considered a release of all error as to him.

IX.—*Reinstatement of Appeals.*

No appeal which shall have been dismissed or abated by the court shall be reinstated or revived after the lapse of sixty days from such dismission or abatement, except for good cause shown the court, verified by affidavits, and upon reasonable notice to the adverse party of the time of making the motion nor then, except in very special cases, unless such motion be made within one hundred and twenty days from the time of such dismission or abatement: provided, that if the court shall not be in session on the day to which such notice shall be given, a farther time of ten days shall be allowed the party to exhibit his motion after the next meeting of the court.

X.—*Certificate of Clerk.*

When an appeal, writ of error, or supersedeas shall be awarded by this court, it shall be the duty of the clerk to issue a copy of the order allowing such appeal, writ of error, or supersedeas, to certify the fact of the allowance thereof to the court below.

XI.—*Notice to Absentees.*

Whenever it is necessary that a non-resident party should have notice of an order of this court, it should be published once a week, for four successive weeks, in the manner prescribed by the act of Assembly, in the case of absent defendants.

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XII.—*Order of Argument.*

The court on the first day of each term will commence calling the cases for argument, in the order in which they stand on the docket, and proceed from day to day during the term, in the same order, and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and, if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket. Ten causes only shall be considered as liable to be called on each day during the term, including the one that may be under argument. No cause shall be taken up out of the order on the docket, or be set down for any particular day, except causes which, from their own peculiar character, or the mandate of the law, are regarded as privileged cases.

XIII.—*Time of Arguments.*

In the argument of causes one hour and fifteen minutes will be allowed each side except in felony cases, in which two hours will be allowed each side, and no more, in either class of cases, without special leave of the court. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments, in which he shall cite all the authorities intended to be relied on by him.

XIV.—*Call of the Docket.*

When any case, which shall be called in the due course of the regular calling of the docket, shall be passed, because the proper process has not been executed, though such case shall not lose its place on the docket, yet it shall not be again called until the next regular calling of the docket.

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XV.—*Causes May Be Submitted on Printed Arguments.*

When a cause shall be called for hearing, the court will receive printed arguments (a copy for each judge) if the counsel on either or both sides shall choose so to submit the same, and the cause shall stand on the same footing as if there were an appearance by counsel. But when a case is taken up for trial upon the regular call of the docket and argued orally in behalf of only one of the parties, no printed argument shall be received, unless it be filed as prescribed by rule second, and the court will proceed to consider and decide the case upon the *ex parte* argument.

XVI.—*Proceedings in Criminal Cases.*

That when a writ of error in any criminal case shall be awarded by a judge in vacation, the same shall be made returnable the first day of the next term thereafter, and if awarded by the court when in session, it shall be made returnable forthwith; and in either case the same shall be heard as soon as the record shall be printed, in preference to any civil business on the docket. And when judgment shall be given in any criminal case, the same shall be certified forthwith to the court from which it came, without further orders.

XVII.—*Rehearing.*

No application for a rehearing will be entertained unless made within ten days after the decision is announced (except as otherwise authorized by law), and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with it and desires a rehearing. And an application under the Code, chapter 170, §3492, page 831, to rehear and review any case decided by this court within the last fifteen days of the preceding term, shall be made within the first fifteen days of the next succeeding term, and not thereafter. And no

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application for a rehearing will be entertained by the court, in any case, unless the reasons therefor, printed, shall be filed at the time such application is made.

XVIII.—*Argument Docket.*

It shall be the duty of the clerk, at the commencement of each session, to make a list of all causes ready for hearing and represented by counsel on either side, which shall constitute the argument docket. A cause may at any time, on motion, without notice, be placed on this docket by order of the court.

XIX.—*Foreign Attorneys.*

Foreign attorneys who desire to obtain a certificate from the Court of Appeals to practice law in the courts of this State as provided by section 3192 of the Code of 1904, without standing a law examination, must furnish a certificate from the court of last resort in the State, Territory, or District of Columbia, wherein he has qualified, that he has practiced law for three or more years in said court, that he is of good moral character, and a proper person to be licensed to practice law. This certificate MUST BE signed by the Chief Justice, or President, of said court, whose signature must be attested by the clerk of the said court and under the seal thereof.

In addition, a certificate must be furnished from two practicing attorneys of such State, Territory, or District of Columbia, practicing in said court, that the applicant is of good moral character and a proper person to be licensed to practice law, whose signatures must be attested by the said clerk in like manner.

XX.—*Mandamus and Prohibition.*

Applications addressed to this court for the issue of writs, other than the writ of *habeas corpus*, by virtue of its original jurisdiction, will be placed upon the general docket as they mature, and be heard when reached upon

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the regular call thereof; subject, however, to be advanced for good cause shown in accordance with rule six.

The records shall be printed under the supervision of the clerk, as in other cases, and must be submitted upon printed briefs, unless the court shall otherwise direct.

April 5, 1917.

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CASES DECIDED

IN THE

Supreme Court of Appeals

OF VIRGINIA

Richmond.

BASHFORD v. ROSENBAUM HARDWARE COMPANY.

November 16, 1916.

Absent, Sims, J.*

1. MUNICIPAL CORPORATIONS—*Streets—Pedestrians—Negligence—Stepping in a Hole.*—A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care depends upon the circumstances of the particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. He is not bound to keep his eyes constantly fixed on the walk, in search for possible holes or other defects, and one who, in stepping backward to look in an adjacent window, steps into a hole in the walk which has been negligently opened behind him and left exposed, without notice or warning, cannot be said to be guilty of negligence as a matter of law.
2. VERDICTS—*Conflicting Evidence—Negligence—Difference of Opinion of Reasonable Men.*—Whether a plaintiff in an action to recover damages for personal injuries has been guilty of contributory negligence is a question for the jury under proper instructions from the court, and their finding will not be disturbed where the evidence is conflicting, or is such that reasonable men might fairly differ as to whether there was such

* Submitted before Judge Sims took his seat.

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negligence or not. Every reasonable inference should be made in favor of a verdict fairly rendered, under proper instructions from the court, in such a case, and it should not be set aside unless the evidence is plainly insufficient to support it.

Error to judgment of the Circuit Court of the city of Newport News, in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

T. J. Christian and *J. Winston Read,* for the plaintiff in error.

Charles C. Berkeley and *Wm. A. Graff,* for the defendants in error.

CARDWELL, P., delivered the opinion of the court.

This action was brought by Frank Bashford against Rosenbaum Hardware Company (a partnership) to recover damages for personal injuries sustained by the plaintiff, which he alleges were caused by the negligence of the defendants.

At the first trial of the case the jury rendered a verdict in favor of the plaintiff for $353.65, which, upon the motion of the defendants, was set aside because the court was of the opinion "that the plaintiff was guilty of contributory negligence." On the second trial, no evidence being offered, a verdict was returned by the jury for the defendants, upon which the court entered judgment, and the case is before us upon a writ of error awarded the plaintiff.

There are no exceptions made a part of the record with respect to instructions given or refused by the trial court, or to the admission or rejection of evidence, so that the

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only question presented is the propriety of the court's action in setting aside the first verdict.

It appears that the defendants were at the time of the accident to plaintiff for which he sues in the hardware business in the city of Newport News, having their place of business on the east side of Washington avenue, between Twenty-sixth and Twenty-seventh streets. They held under lease from one J. D. Bohlken a cellar or basement under his store building just opposite to their store on Washington avenue, and were the sole lessees thereof. Entrance to this cellar or basement was had by means of an opening in the sidewalk in front of the store building occupied by Bohlken, about four feet square, which opening, when not in use, was covered with two iron doors, and the cellar or basement was used by the defendants as a storage room in their hardware business. When these doors were open there was a chain attached to each of the doors on the ends thereof nearest the building occupied by Bohlken (which is known as the Darling building), which chain constituted the only barrier or protection afforded the public, in so far as the east or west side of said opening was concerned. This opening was almost in the middle of the sidewalk, and when the iron doors were closed the place was safe, but when open, and only then, it became dangerous to pedestrians passing over or along the sidewalk. Washington avenue is, as it appears, the principal business street of the city of Newport News, and pedestrians are continuously passing to and fro over the sidewalk at the place where the opening therein just described was located.

The plaintiff, a young man about thirty-three years of age, had been employed as foreman for the United States Shipping Company for about seventeen years, his business being to see that the ships of his employer were kept in proper condition, which duties required his presence on the water front, and he was very rarely on Washington avenue

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at the place where he received the injuries of which he here complains—in fact, had not been there for a year prior to the day he received his injuries. On that day, about three o'clock in the afternoon, he was at the Warwick Pharmacy, on the corner of Twenty-sixth street and Washington avenue, the same side of the street as Bohlken's store, and crossing Twenty-sixth street he proceeded along the sidewalk towards Twenty-seventh street, and upon approaching the Darling building, in which Bohlken had his store, his attention was attracted to certain flags or pennants of various universities and colleges in the window of Bohlken's store. Bohlken's store is in about the business centre of the city, and the front of the store is divided into three sections, an entrance with a show window on each side, and in the centre of the entrance, on the building line, is a large revolving magazine roller. Just in front of the show window nearest to Twenty-seventh street is located the opening in the sidewalk above mentioned, through which and through which alone the defendants had access to the cellar under Bohlken's store, the short sides of this entrance being parallel to the building line and the other a shorter distance from the curb, making the smoothly paved sidewalk about 18 feet wide from the building line to the curb.

Upon plaintiff's attention being attracted to the flags or pennants in the window of Bohlken's store, he stopped in front of the window to look at them. This was the window opposite the entrance to defendants' cellar and the one nearest Twenty-seventh street. Pennants were also displayed in the window nearest Twenty-sixth street, but by reason of the magazine roller stand in front of the centre of the store, plaintiff was prevented from examining them from where he was standing, and not seeing a pennant of the University of Pennsylvania in the window nearest Twenty-seventh street, he stepped back to get a better view of the window nearest Twenty-sixth street, and in doing so

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his foot caught in the chain hanging suspended in the top of the iron door nearest Twenty-sixth street and losing his balance, he fell into the opening. In falling over the chain the iron door was, of course, closed, and the plaintiff's neck was caught between the two iron doors, holding him thus suspended for several minutes and until he was released by persons who came to his relief. He describes the occurrence as follows: "I stepped back one step. My left foot went in the hole." "I found myself falling and I turned and tried to grab for the door and missed it and my weight went down * * * and this foot (right foot) caught under the chain." "I turned that way (to the left) and that door came down." "That door hit me under the neck." When asked if one door hit him from underneath the throat and one hit him from behind, he answered that "this door in front (indicating upon a photograph) strangled me unconscious, and this door (indicating the door next to 27th street) hit me here (indicating the rear of the left side of his neck)." Q. "The door nearest 26th street. The one that hit your throat?" A. "Yes, sir." Plaintiff does not undertake to say whether both doors were open or only one of them when he fell in the opening, his reply to that inquiry being, "I could not say. I did not notice."

On the afternoon of this accident to plaintiff defendants had two of their employes, a colored boy, Melvin, and a white boy, Walter Spence, carrying ladders and screens from the cellar under Bohlken's store to a room on the second floor of their place of business across the street, getting ready for the spring and summer sales of these articles, while another employe, Greshaw, engaged on the second floor, received and placed the ladders and screens as they were brought over by the two boys, Melvin and Walter Spence, which undertaking was still in progress when the accident to plaintiff occurred.

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There was, as it appears, only one eye-witness to the occurrence—one Thomas Chambers, colored, a witness called by the defendants—who states that he was an employe of Bohlken, and was standing by the window looking out, and saw Bashford (plaintiff) examining the pennants in the window nearest Twenty-seventh street. At this time, according to the statements of Chambers, a colored boy opened the iron door over the entrance to the cellar nearest Twenty-sixth street and went down into the cellar. Witness further testified as follows:

"I saw him (plaintiff) when he fell down in the cellar." "What?" Ans. "I saw him fall down in the cellar." "What was the cellar doing open?" A. "It was a colored boy come there and hoisted up just one door—hoisted up the door towards 26th street." "Hoisted up the door next to 26th street?" A. "Hoisted up the door next to 26th street." "The other door was down?" A. "Yes, sir." "You were where?" A. "I was standing right there by the window." "By the window?" A. "Yes, sir." "Well, what was this boy doing there—the boy down in the cellar?" A. "I don't know, sir." * * * "Did you see him come out of the cellar?" A. "No, sir, I didn't see him come out." This latter question was put to the witness and he repeated the same answer thereto. After stating that the boy was a colored boy and that witness never saw him come back out of the cellar, he further describes how the accident to plaintiff occurred as follows: "I came out of the pool-room, and he was standing there looking in the window, and they hoisted up the door while he had his face to the window (pause) (By the court) "Go ahead. Then what?" A. "That is all that I know about it." "Well, how did he fall in—go ahead and tell." A. "He fell face foremost, one hand hung on the door while he was falling in. He fell by his neck."

W. C. Bohlken was standing in the door of Bohlken's

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store and says he saw the door next to 27th street fall on the plaintiff and helped to get him out.

Seigel, who was running a pawn shop right across the street from the place of the accident, testified as follows:

"Well, I was standing somewhere near the entrance of my store there, and all of a sudden I heard a bang over there, and I ran out to see what it was, and I saw that the door had fallen. I ran across there. One of the doors was down and the other was on top of his (plaintiff's) neck, it seemed to me."

"Which door was down? One next to 26th street or the one next to 27th street?" A. "26th street."

"And the other was on him?" A. "Yes."

Plaintiff testified that a number of people were passing to and fro on the sidewalk and he did not notice the iron doors as he approached Bohlken's store, and that he was not aware that these doors or either of them were open prior to the time he fell into the opening. His theory, upon which his case was tried before the jury, is that one of the doors was opened behind him while he was looking in Bohlken's window nearest Twenty-seventh street, and he states that he was wholly ignorant of this trap which had thus been set behind him. The testimony given by Thomas Chambers, a synopsis of which appears above, is in entire accord with the evidence of the plaintiff, and it was a fair inference to be drawn by the jury from this evidence that the cellar doors were not open at the time plaintiff approached Bohlken's store, and that he was not aware that the door had been opened behind him; that one of the doors was opened behind him by a colored boy while his (plaintiff's) attention was riveted on Bohlken's display windows; and that this colored boy was at the time in the employ of the defendants and engaged in their work.

These questions of fact were submitted to the jury by instructions unobjected to, and the jury found that the

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defendants were guilty of negligence—in fact, there seems to have been little or no dispute upon that question between counsel for the respective parties in the trial of the case in the lower court, and hence each instruction prayed for by the defendants dealt only with the question of the alleged contributory negligence of the plaintiff.

The jury's verdict was for the plaintiff, under instructions unexcepted to, as already stated, which submitted both the questions of the defendants' negligence and that of the plaintiff's contributory negligence to them, and, after a view by the jury of the premises, allowed by the court; therefore, to disturb this finding it was necessary for the trial court to have taken the view that there could be no difference of opinion amongst reasonable men as to the plaintiff's contributory negligence.

In this view we cannot concur, but do not deem it necessary to prolong this opinion by entering upon a more detailed analysis of the evidence than we have already given. "The general doctrine is that whether one had been guilty of negligence or not is a mixed question of law and fact, to be decided by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed or the evidence conflicting." *Cardwell* v. *N. & W. Ry. Co.*, 114 Va. 500, 77 S. E. 612, and cases cited.

In the first instruction given by the court in this case the jury were rightly told, in accordance with the law, as settled by numerous decisions of this and the courts in other jurisdictions, that the plaintiff had the right, in the absence of knowledge to the contrary, to assume that the sidewalk in question was in a reasonably safe condition, and he was not, as a matter of law, required to be on the lookout for defects; that if the jury believed from the evidence that the plaintiff, while exercising ordinary care, stepped into the opening in the sidewalk affording entrance

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into the defendants' cellar, and that said opening was not properly guarded, and thereby received the injuries complained of, then they should find for the plaintiff.

Upon the evidence in the case, which was conflicting throughout, and after a view of the ground and surroundings where the accident to the plaintiff happened, the jury decided the issue which involved very largely the question of the credibility of the respective witnesses, in favor of the plaintiff—that is, that he was not guilty of contributory negligence, and to justify an interference with that verdict it would be, as remarked, necessary for the court to take the view that there could be no difference of opinion amongst reasonable men as to the plaintiff's contributory negligence. The fact that the plaintiff, about a year prior to the time he received his injuries, had been to Bohlken's store and knew of the presence of these doors in the sidewalk is of little or no importance in the case, for the obvious reason that there is a manifest distinction between knowledge of a defect or obstruction in a street or sidewalk which is at all times dangerous, and knowledge of an opening to a cellar, which, when closed, is perfectly safe. There is no dispute in this case that there was absolutely no danger to the plaintiff as long as the doors over the entrance to the cellar through the sidewalk remained closed, and it was only when one of the doors was negligently opened behind him, without notice, that the place became dangerous. His statement is that when he took a step backwards to get a view of the opposite window, his foot caught in the chain hanging from the top of one of these doors. These windows are, as counsel for the plaintiff argue, supposedly to attract the attention of the passer-by, and the plaintiff was only doing what men of ordinary care continually do, not only in Newport News but in all cities and towns of the Commonwealth; and when, in taking a step backward to look in an adjacent window, he stepped into

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a hole in the sidewalk, which had negligently been opened behind him and left exposed, without notice or warning to him, such conduct does not, as a matter of law constitute negligence.

"A person passing along a sidewalk in a city is required to use ordinary and reasonable care and diligence to avoid danger, but what is such ordinary and reasonable care depends upon the circumstances of each particular case, and is a question of fact for the jury. A pedestrian upon such sidewalk may ordinarily assume that the sidewalk is in a reasonably safe condition for travel. To hold that such person is absolutely bound to keep his or her eyes constantly fixed on the sidewalk, in search for possible holes or other defects, would be to establish a manifestly unreasonable and wholly impracticable rule. * * *" *City of Chicago* v. *Babcock*, 143 Ill. 358, 32 N. E. 271; *Earl* v. *City of Cedar Rapids*, 126 Iowa, 361, 102 N. W. 140, 106 Am. St. Rep. 361; *Richmond City* v. *Pemberton*, 108 Va. 220, 61 S. E. 787.

It has been repeatedly held by this court, and it is the rule in all jurisdictions so far as we are advised, that whether a plaintiff in an action to recover damages for personal injuries has been guilty of contributory negligence is a question for the jury under proper instructions from the court, and their finding will not be disturbed where the evidence is such that reasonable men might fairly differ as to whether there was such negligence or not; and, as is so well expressed in the opinion by Burks, J., in *Blair & Hoge* v. *Wilson*, 28 Gratt. (69 Va.) 165: "Every reasonable presumption should be made in support of a verdict fairly rendered, and according to the long established, well settled rule by this court, such a verdict cannot be set aside as against the evidence, unless there is a plain deviation—unless the evidence is plainly insufficient to warrant the finding."

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The record in the instant case has been given a most careful consideration, and we cannot say that contributory negligence on the part of the plaintiff is "a certain and incontrovertible inference from the evidence;" nor can it be said that the verdict of the jury acquitting him of contributory negligence is plainly against the evidence or plainly without evidence to sustain the finding; nor that the evidence is plainly insufficient to sustain the finding of the jury that the proximate and efficient cause of the injuries sustained by the plaintiff was the negligence of the defendants; and, therefore, upon the whole case, we are of opinion that the judgment of the circuit court should be reversed, and this court will enter judgment for the plaintiff (plaintiff in error here) for the amount of the verdict in his favor found by the jury at the first trial of the cause.

Reversed.

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Syllabus.

Richmond.

BAUGH & SONS CO. v. BLACK AND OTHERS.

November 16, 1916.

1. EVIDENCE—*Joint Bond—Principal and Surety—Case in Judgment.*—Where father and son execute their joint bonds to a creditor and secure the same by a joint deed of trust on their separate real estate, and the deed provides that the trustee shall sell first the lands conveyed by the father "and if a sufficient amount is derived to pay the debt and costs, will not make further sale," while this clause of the deed is a circumstance tending to show that the father was the principal debtor, it may be shown from other parts of the deed and by extrinsic evidence that as between themselves, each was a principal as to one-half the debt and a surety as to the other half, and such was shown to be the fact in the case in judgment.
2. SUBROGATION—*Principal and Surety—Payment by Surety—Funds of Principal in Hands of Court—Case in Judgment.*—As a general rule, before a surety is entitled to be subrogated to the rights of the creditor against the principal debtor, he must have actually paid or satisfied the debt, but, where the rights of the parties are clear, a court of equity, in carrying out the principles underlying and constituting the doctrine of subrogation, will take the shortest road to the right and justice of the case. The doctrine of subrogation has nothing of form or technicality about it. It is the creature of equity, and essential justice is its object. In the case in judgment, the principal's lands have been sold and the proceeds are under the control of the court, and the court will not do the vain thing of selling the lands of the surety and then granting him subrogation.
3. ESTOPPEL—*Case in Judgment—Statement in Deed—Misrepresentation.*—J. and L., who were father and son, made their joint bonds to a creditor, and secured the same by a joint deed of trust on their separate real estate, which deed provided that the trustee "sell first the lands conveyed by J. and, if a sufficient amount is derived to pay the debt and costs, will not make further sale." Subsequently, L. conveyed his land in trust to secure other creditors, some of whose debts were con-

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tracted after the recordation of the first deed and upon the faith of the above quoted statement therein contained, but who made no inquiry of J. as to the relation of himself and L. concerning the joint debt above mentioned. The creditors in the deed made by L. only claimed that J. was estopped by the deed first mentioned from setting up the claim that he was primarily bound for only one-half of the debt secured by the joint deed.

Held: There was no estoppel. The mere fact that one clause of the deed tended to show that J. was the principal as to the whole debt, when other clauses and extrinsic evidence showed that he was principal as to only one-half the debt, did not give the creditors in the deed made by L. only on his land any higher rights than they would have had if the deed had been silent on the subject, that the creditors of L. could stand on no higher ground than their debtor, and that as to creditors who claimed to have extended credit on the faith of the statements in the first deed there could be no estoppel, as no inquiry was made of J. nor any misrepresentation made by him.

Appeal from a decree of the Circuit Court of Augusta county. From an adverse decree some of the creditors appeal.

Affirmed.

The opinion states the case.

Quarles & Pilson, A. C. Gordon, Gardner L. Boothe and *William A. Pratt*, for the appellants.

Joseph A. Glasgow, for the appellees.

KELLY, J., delivered the opinion of the court.

This suit was brought by trustees hereinafter named to obtain the decision and direction of the court upon the relative rights of sundry parties claiming liens upon certain real estate held by them.

On the first day of July, 1908, J. T. Black, J. Lacy Black and Patsy C. Black, his wife, executed a deed of trust to

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secure Andrew Bowling in the sum of $20,000. This sum was evidenced by five bonds made and signed in the common form of joint obligations by J. T. Black and J. Lacy Black. The deed of trust embraced about 300 acres belonging to J. T. Black and about 127 acres belonging to J. Lacy Black and wife, and contained the following provisions material to the present controversy:

"In distributing the purchase money the trustee shall pay: (1) The cost of executing this trust. (2) Any unpaid taxes on the lands. (3) The amount of said debt; and the residue of the purchase money he will pay over to the said parties of the first and second parts as their interest in the said lands and the price derived for the same may entitle them.

"In enforcing said deed, said trustee will sell first the lands conveyed by said J. T. Black, and if a sufficient amount is derived to pay the debt and costs, will not make further sale under this deed."

In May, 1909, J. T. Black sold 157 acres of his land embraced in the deed of trust, and realized thereon $11,790, out of which he paid, before maturity, one-half of the Bowling debt, applying the residue of the purchase money to his own use. This was done by and with the consent of Andrew Bowling and J. Lacy Black.

On the 20th of August, 1912, J. Lacy Black and wife executed a second deed of trust on their 127 acres above mentioned, to secure Andrew Bowling in the further sum of $7,000; and on December 17, 1914, they executed still another deed of trust on the 127 acres and on certain other real estate and personal property, to secure, first, the debts theretofore secured by prior deeds of trust, "in the order of their legal priority," and, second, the general creditors of the grantors, among whom were the appellants here.

This suit, for advice and direction, was brought by Pratt and Kerr, trustees under the last-named trust deed. The controversy in the case arises between the general credi-

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tors of J. Lacy Black and wife, on the one hand, and J. T. Black, on the other—the former claiming that the balance of J. T. Black's 300 acres included in the first deed of trust must be subjected to the satisfaction of the unpaid portion of the original Bowling debt before that debt can reach the lands of J. L. Black and wife, and J. T. Black claiming that he was primarily liable, at the most, for only one-half of the original Bowling debt, and, having paid that, his lands cannot be further subjected unless the lands of J. L. Black and wife prove insufficient to pay the other half. His original and further-reaching contention (not inconsistent, however, under the allegations in his answer and under the evidence, with his present position) that he was liable only as surety and not to any extent as principal, is not insisted upon in this court.

The cause was referred to a commissioner for a report on the properties involved and the liens thereon in the order of their priority. Pending this reference, the trustees under the last named deed of trust sold the 127 acres of land owned by J. L. Black and wife at a private sale for $20,000. This was done by consent of all parties interested, and with the approval of the court, and the proceeds were brought into the cause "to stand exactly in the same position as the lands," and subject to exactly the same liens and equities.

It was, of course, conceded that the second Bowling deed of trust for $7,000 would, in any event, have to be satisfied from the proceeds of the 127 acres before the general creditors of J. L. Black and wife would have any valid claim thereon, and accordingly that deed of trust was paid off and discharged by the trustees pursuant to a consent decree in the cause.

The report filed by the commissioner seems to proceed upon the theory that as between J. T. and J. L. Black the former was only bound for one-half of the original Bowl-

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ing debt, and that if J. T. Black's lands should be subjected for more than one-half thereof, he would be entitled to be subrogated to the rights of Bowling against J. L. Black; but the commissioner was of opinion, and so reported, that this original status of J. T. and J. L. Black would have to yield to the rights of creditors holding debts subsequently acquired against J. L. Black and wife. The report, in this respect, concludes as follows: "But assuming that the Bowling lien will be paid by the J. T. Black land, certainly until creditors of J. L. Black and wife, other than J. T. Black, under the Gordon (second) deed of trust and those secured under the Pratt and Kerr (third) deed, are all paid, J. T. Black will not have the right of subrogation against their land, and cannot come into competition with those creditors, or share in the distribution of assets realized by Pratt and Kerr, trustees." In arriving at this conclusion, the commissioner was controlled by the clause in the first deed of trust directing that the J. T. Black land should be first sold, and, in case the same brought enough to pay the debt and costs, none of the other lands embraced therein should be sold, and by the fact that two of the general creditors introduced proof that they had examined the records and had been induced to extend credit to J. L. Black and wife by reason of that clause in the deed.

To this report J. T. Black excepted. The court sustained the exception, and its action in doing so is the subject of this appeal.

The essential portion of the very comprehensive decree entered by the court was as follows:

"Upon consideration whereof, the court doth sustain the exceptions of J. T. Black to the report of Master Commissioner Nelson as hereinafter set out; the court is of the opinion that the balance due upon the bonds dated July 1, 1908, executed by J. T. Black and J. Lacy Black to Andrew Bowling and secured by deed of trust dated July 1, 1908,

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to Wm. Patrick trustee, upon the lands of J. T. Black, J. Lacy Black and Patsy Black should be paid at once and Andrew Bowling is entitled to receive payment of said balance at once irrespective of the rights of J. T. Black, J. Lacy Black and Patsy Black, among themselves. And it appearing to the court that the lands of J. Lacy Black and Patsy Black have been sold by agreement of parties to this cause by Wm. Pratt and H. H. Kerr, trustees, in this cause, and that the fund derived from the sale of said lands is in the hands of the said Wm. A. Pratt and H. H. Kerr, trustees, and is ample to pay the balance due on the said Bowling debt, it is therefore adjudged, ordered and decreed that the said Wm. A. Pratt and H. H. Kerr, trustees, do forthwith pay out of the funds in their hands derived from the sale of the lands of J. Lacy Black and Patsy Black the balance due to Andrew Bowling upon the debt secured under the deed of trust dated July 1, 1908, and the court, proceeding to consider and determine the rights of J. T. Black, J. Lacy Black and Patsy Black as between themselves, is of the opinion that J. T. Black and J. Lacy Black are joint obligors in the debt of $20,000.00 evidenced by the bonds dated July 1, 1908, executed by J. T. Black and J. Lacy Black, payable to Andrew Bowling and secured by a deed of trust of even date with said bonds, executed by J. T. Black and J. Lacy Black and Patsy Black to Wm. Patrick, trustee, and that J. T. Black as principal owes one-half of said debt and is surety for the other half of said debt and that Patsy Black, the wife of J. Lacy Black, is surety for her husband, J. Lacy Black. And it appearing from the evidence that J. T. Black has paid and discharged one-half of said debt, the sum of $10,000.00, the amount for which he is liable as principal, the balance of said debt remaining unpaid, that is, one-half, is the debt of J. Lacy Black as principal and Patsy Black, as sureties, and it is accordingly so adjudged, ordered and decreed.

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"And it appearing to the court that by agreement of parties to this cause the land of J. Lacy Black and the land of Patsy Black bound by the deed of trust above mentioned, have been sold together for the sum of $20,000.00, it is adjudged, ordered and decreed that the part of this $20,000.00 derived from the land of J. Lacy Black is as between the parties first applicable to the payment of the balance due to Andrew Bowling and any balance left unpaid is payable equally by J. T. Black and Patsy Black, and the land of J. T. Black passing under said deed of trust is bound for the amount so owed by him, and the deed of trust executed by him to the said Patrick, trustee, is hereby kept alive and in full force for that purpose.

"And it is further adjudged, ordered and decreed, that this cause be and the same is recommitted to Master Commissioner Nelson, who shall make and state an account showing what is a fair division of the purchase price of $20,000.00 paid for the land of J. Lacy Black and the land of Patsy Black as between said J. Lacy Black and said Patsy Black."

In the view entertained by us, the question which is decisive of the controversy in hand is whether J. T. Black was, as he appears upon the face of the Bowling bonds to be, a joint maker with J. L. Black, or was, as would seem probable from the last clause in the deed of trust if that clause stood alone, the principal debtor upon the entire Bowling debt of $20,000 with J. L. Black as his surety. The circuit court held that J. T. and J. L. Black were joint makers of the bonds, each of them being bound as principal for one-half and as surety for the other half thereof. In this holding there was, in our opinion, no error.

The loan of $20,000 from Bowling was obtained to meet pressing obligations owing to sundry banks by the firm of H. A. Black and Brother. This firm was composed of H. A. and J. L. Black, both sons of J. T. Black. The latter

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was not a member of that firm, but had been a very heavy accommodation endorser for it, and was in that way liable upon its indebtedness. The entire $20,000 secured from Bowling was turned over to J. Lacy Black, and, except as to a negligible sum, was applied by him to the firm debts. Some of these debts were incurred by H. A. Black before J. Lacy Black became his partner, but the debts were thereafter assumed as liabilities of the firm. It appears, however, that upon about $3,000 of these liabilities J. T. Black was from the outset bound as principal.

In the course of his written opinion in this case, the learned judge of the circuit court made the following statements, which are, in all substantial respects, fully supported by the record and which we may well adopt in this connection:

"The money ($20,000 from Bowling) was paid directly to Lacy. Not a dollar of it went into the hands of the father. It was used to pay an indebtedness, $3,000 of which was primarily the father's; $17,000, the residue thereof, to pay debts, a part of which was the primary indebtedness of H. A. Black and a part the primary indebtedness of H. A. Black & Brother. All of this indebtedness, however, by renewals, etc., had become the indebtedness of H. A. Black & Brother. These facts, standing alone, lead us to the conclusion that the Bowling loan was negotiated primarily to benefit Black & Brother, and not J. T. Black. Certainly this would seem to be so to the extent of $17,000."

Further on in the opinion it is said: "It would not be just to treat J. T. Black as an accommodation endorser for the entire amount; $3,000 of this money went to pay a debt for which the father was primarily liable. In 1909, one year after this money was borrowed, J. T. Black sold to outsiders about 150 acres of his land for $11,790. $10,000, part thereof, he paid to Bowling. A part of this he paid on bonds not yet due. In other words, before any

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controversy arose as to the rights of the parties *inter sese*, he paid one-half of this debt and no more, which would seem to indicate that he then considered that he and his son were what their obligation indicated they were, namely, joint obligors."

A careful consideration of the entire evidence, which is somewhat lengthy, fully satisfies us that the court could not have properly reached a conclusion thereon less favorable to J. T. Black than that indicated in the foregoing extracts from the opinion. Such is the clear result from the testimony of J. T. Black and his two sons, J. L. and R. B. Black, showing without any serious conflict or contradiction the origin and development of the indebtedness to which the Bowling money was applied. It is true that certain statements of J. Lacy Black, if isolated from their setting and removed from the influence of his testimony as a whole, would tend strongly to prove that the entire Bowling debt was primarily owing by J. T. Black. And it is likewise true that if certain statements alleged to have been made by J. Lacy Black, not in the presence of J. T. Black and the evidence of which was objected to by J. T. Black, as to the primary liability of the latter, could be regarded as evidence against him, these statements would have a like tendency. So, too, as to the evidence given by the witness Cohron, who made the direct statement that the original loan was obtained from Bowling to pay debts of H. A. and J. T. Black, and that on his advice J. L. Black was brought into the transaction for better security. This testimony, however, was in the main essentially hearsay and was duly objected to on that ground; it is utterly inconsistent with the relationship which the uncontradicted evidence shows J. L. Black bore to much of the indebtedness; and, moreover, the witness giving the testimony was shown to be hostile to J. T. Black. The circuit court was fully justified in attaching, as it did, small weight to this evidence.

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Nor do we think the result is affected by the clause in the original Bowling deed of trust which directs that the trustees, in case of sale, shall "sell first the lands conveyed by J. T. Black and if a sufficient amount is derived to pay the debt and costs, will not make further sale." Undoubtedly the existence of this clause in the deed is a circumstance tending to show that J. T. Black was the principal debtor, but it is a circumstance which would be conclusive of that fact only in the absence of countervailing proof. Other parts of the deed of trust indicate that the bonds secured thereby were joint bonds, and the extrinsic evidence leaves no room to doubt that they were so, both in form and in fact. As between themselves, there was no valid reason why this father and son might not have agreed to this order of sale from motives in no way affecting their relationship to the indebtedness. It was a matter of no concern to the creditor, and as to which he could have no voice if his debt was paid. The debtors might have changed the order of sale by direction to the trustee at any time after the deed was made. Of course the trustee could not have changed that order without their direction or consent, and this is all that is meant by the authorities invoked by the appellants for the proposition that sales under deeds of trust must be made in the manner and order therein directed.

Without extending further the discussion of this branch of the case, we have no hesitancy in saying that the clear weight of the evidence supports the finding of the circuit court as to the respective liabilities of J. T. and J. L. Black upon the Bowling bonds.

But it is contended by the appellants that even if J. T. Black is primarily liable for only one-half, and is the surety of J. L. Black as to the other half of the Bowling debt, the conditions have not yet arisen to entitle J. T. Black to be subrogated to the rights of Andrew Bowling because as

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yet J. T. Black has in fact paid only his own half of the debt to Bowling. There is no merit in this contention. It is true, as a general proposition, that before a surety is entitled to be subrogated to the rights of the creditor against the principal debtor, he must have actually paid or satisfied the debt, but, where the rights of the parties are clear, a court of equity, in carrying out the principles underlying and constituting the doctrine of subrogation, will take the shortest road to the right and justice of the individual case. The doctrine "has nothing of form, nothing of technicality, about it; and he who in administering it would stick to the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object." *Enders* v. *Brune*, 4 Rand. (25 Va.) 447. It "has been denominated one of the benevolences of the law, created, fostered and enforced in the interest and for the promotion of justice. * * * In no other jurisdiction has the doctrine been more firmly adhered to or more liberally expounded and applied, to meet the exigencies of particular cases, than in Virginia." *Sands* v. *Durham*, 99 Va. 267, 38 S. E. 145, 54 L. R. A. 614, 86 Am. St. Rep. 884.

In this case, as we have seen, J. T. Black, with the proceeds of a part of his land, has paid one-half of the Bowling debt, being all that he was bound for as principal. The lands of J. L. Black and wife have been sold for more than enough to pay the balance of the debt, and the proceeds are now in this cause subject to the order of the court. It would be a vain thing for the court to require the balance of J. T. Black's land to be sold, use the proceeds to pay the balance of the Bowling debt, and then reimburse J. T. Black from the proceeds realized on the sale of the lands of J. L. Black and wife. The circuit court, therefore, was entirely right in its decree, directing Bowling to be paid the balance of the debt from the funds in hand, and making proper

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reference to a commissioner to adjust the equities arising out of the fact that some of the land of Patsy Black, who was not liable at all except as surety for her husband, has contributed to the payment.

Having decided that the direction to the trustees to sell the J. T. Black land first and to stop there if enough money was realized to pay the Bowling debt, was a matter over which the grantors in the deed had control and in which the secured creditor could have no voice if his debt was paid, it becomes unnecessary to consider the appellants' further contention that if the entire debt had been paid by a sale, as directed in the deed, of the J. T. Black land, such sale would have exhausted the function of the deed of trust and defeated any claim to subrogation on the part of J. T. Black. This contention, and the authorities cited to sustain it, could only avail the appellants in case they could maintain their original proposition that J. T. Black was the principal debtor as to the whole debt. If he was in fact merely the surety as to the unpaid half of the Bowling debt, and his land had been sold therefor, the mere fact that the deed of trust directed his land to be sold first would not have prevented him from showing the actual relationship of himself and J. L. Black to the indebtedness, and that fact being shown, his right of subrogation would have followed as a matter of substantial equity and right. The debt, in that event, would be paid and satisfied, but equity would keep the lien alive for the benefit of J. T. Black. *Leake* v. *Ferguson*, 2 Gratt. (43 Va.) 433; *Gatewood* v. *Gatewood*, 75 Va. 407; 37 Cyc. 411.

Finally, it is claimed by the appellants that, conceding J. T. Black to have been primarily obligated as to only one-half of the Bowling debt, he is estopped by the terms of the deed of trust from setting up that fact as against the subsequent creditors of J. Lacy Black. It was upon this point alone, as we understand the commissioner's report,

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that he found against the position asserted on this appeal by J. T. Black. In other words, the commissioner and the court seem to have reached the same conclusion upon the evidence as to the actual and true original relationship of J. T. and J. L. Black to the Bowling debt. Both the commissioner and the court evidently regarded them as joint makers of the bonds. This conclusion, which was manifestly correct, renders the decree complained of necessarily right, unless J. T. Black is estopped from asserting his true position. In our opinion, the circuit court was right in holding that he was not so estopped.

As an original proposition, the court was plainly correct in saying, in the opinion already cited, that "a stream cannot rise higher than its source. The rights of Lacy Black's creditors are the rights of Lacy Black;" and the mere fact that one clause in the deed of trust tended to show that J. T. Black was the principal debtor, and that none of the lands of J. L. Black and wife would be subjected to the Bowling lien if the J. T. Black land was sufficient to pay it, did not give the creditors any higher rights than they would have had if the deed had been silent on the subject. It is true that two of the general creditors introduced proof to the effect that they extended credit to J. Lacy Black on account of the provisions of the deed of trust, but there is nothing whatever in the record to connect J. T. Black in any way with this action on their part, or to show that he ever had any intimation that they were being influenced by what they claim to have believed was his relationship to the Bowling debt. As to the majority of the creditors, there is no evidence at all that they so much as had actual knowledge of the existence of the deed of trust or of its contents, and, of course, therefore, none that they were influenced thereby to extend credit to J. L. Black. Not a single one of them ever made any inquiry of J. T. Black, as they might easily have done if they intended to rely upon

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their present contention. He made no representations to any of them; and he could not have had any purpose to defraud them by the language in the deed, because their debts were not in existence when the deed was made. That deed indicated on its face that the bonds secured by it were the joint bonds of J. T. and J. L. Black, and showed furthermore, that if, in any event, all the lands embraced therein should be sold and any balance remained over and above the debt and costs, such balance would belong to J. T. Black and J. L. Black and wife, "as their interests in the said lands and the price derived for the same" might entitle them. Inasmuch as he made no representations to them, and they sought no information from him, all of the general creditors must rest their claim to estoppel as against J. T. Black solely upon the existence in the record of language employed before their debts had been contracted, which language, taken with the entire context, was equivocal and uncertain. Under these circumstances, it is clear, upon familiar and settled principles, that the claim of estoppel must fail. *Bargamin* v. *Clark*, 20 Gratt. (61 Va.) 544, 552; *Repass* v. *Richmond*, 99 Va. 508, 511, 39 S. E. 160; *Taylor* v. *Cussen*, 90 Va. 40, 43, 17 S. E. 721; *Atkinson* v. *Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

There was no error in the decree complained of, and it must be affirmed.

Affirmed.

SIMS, J., dissenting:

I concur in the above opinion in so far as it holds that as between themselves J. T. Black and J. Lacy Black were each bound as principal debtor for one-half of the Bowling $20,000 deed of trust debt and as surety for each other respectively for one-half of such debt; but I cannot concur in the view that, as against the appellants, lien creditors of J. Lacy Black and wife, J. T. Black is entitled to any preferred lien on the property of J. Lacy Black and wife,

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with any right to have such property subjected to such lien, and the proceeds of sale thereof applied to the payment of the unpaid half of said debt in preference to the rights of appellants to have such property subjected to their lien and the proceeds of sale applied in accordance with such lien to their debts and to said unpaid half of the said Bowling debt *pro rata*, as per the last deed of trust of date December 17, 1914, executed by J. Lacy Black and wife.

This conclusion I feel necessarily results from a consideration of the rights of the respective parties as fixed by the deeds of trust executed by J. T. Black and J. Lacy Black and wife, which fixed the lien rights of the appellants.

When J. T. Black paid the half of said Bowling debt for which he was bound as principal debtor, the remaining half of such debt was the debt of J. Lacy Black as principal and of J. T. Black as his surety. By the last deed of trust above mentioned J. Lacy Black and wife gave a lien on the real and personal property conveyed thereby to secure, along with the general debts therein mentioned, among which were the debts of appellants, "any and all other debts which may be asserted against the parties of the first part" (J. Lacy Black and wife) "although they may not be herein specifically set out." The said indebtedness of J. Lacy Black as principal for said unpaid half of said Bowling debt was therefore thereby secured as a lien upon the property thereby conveyed in the same class and of the same dignity as to priority as the debts of appellants. Under this deed of trust J. T. Black was given, indeed, directly no lien, but the said unpaid half of the said Bowling debt was given a lien of the same dignity as the lien of the debts of appellants, which in equity J. T. Black has the right to have enforced to his exoneration as surety and to his relief upon his liability as surety to the extent that the said unpaid half of said Bowling debt may be paid off and discharged as the result of enforcing such lien.

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Has J. T. Black, as against appellants, lien creditors of J. Lacy Black and wife, the right to the benefit of any other lien?

No other lien was, at any time, expressly given to him by J. Lacy Black and wife; and after the last deed of trust from them was executed and recorded, it was beyond their power to do anything to give J. T. Black any lien in preference to the lien given by such deed of trust to appellants.

The claim of J. T. Black, however, is that he is entitled in equity, by subrogation, to have the lien of the first deed of trust, mentioned in the above opinion, to the extent that it secures the payment of the unpaid half of said Bowling debt, enforced against the property of J. Lacy Black and wife conveyed thereby, to his exoneration as surety on such part of such debt. Let us see how this will work out upon well settled principles.

If we disregard the objection that J. T. Black would not have any right of subrogation until he in fact paid out money as surety and treat him as if he were in the position of having paid the whole of said Bowling debt, what right would he have to ask that the property of the latter conveyed by said first deed of trust be subjected to satisfy the half of such Bowling debt for which J. Lacy Black was the principal debtor? His rights must stand or fall under the provisions of such deed of trust as they existed at the time of the execution of the last deed of trust, as against appellants who were given rights as lien creditors by the last deed of trust.

If, then, we treat J. T. Black as having paid the whole of said Bowling debt, what would be his rights under said first deed of trust? Why, plainly he could be subrogated only to the rights of said Bowling debt to the extent of the unpaid half of it for which he was surety.

By the express terms of the first deed of trust, "In enforcing said deed, said trustee will sell first the lands con-

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veyed by J. T. Black and if a sufficient amount is derived to pay the debt and costs, will not make further sale under this deed."

A court of equity could give to J. T. Black only the right of subrogation to such rights as the first deed of trust would have given said unpaid half of the Bowling debt had it remained in the hands of Bowling. These rights were subject to and could not escape the effect of the provision next above quoted.

The provision above quoted should not be ignored by the court. It was embodied in the deed of trust by the parties thereto, and there could be no sale except in accordance therewith. 3 Jones on Mort., sec. 1778.

That is to say, by such subrogation J. T. Black could have acquired no right to enforce such first deed of trust against the lands of J. Lacy Black and wife, save only in the event that the lands of himself conveyed by such trust deed were insufficient to pay the whole Bowling debt and costs. As it is conceded in the case that J. T. Black's lands were amply sufficient to do this, J. T. Black by such subrogation could acquire no right whatever to subject, or have subjected, the property of J. Lacy Black and wife conveyed by such first deed of trust; hence, the subrogation he asks would be barren of any beneficial result to J. T. Black—could give him no lien, nor the benefit of any lien, on the lands of J. Lacy Black and wife.

With respect to the position that the debtors, J. T. Black and J. Lacy Black and wife, might have changed "the order of sale by direction to the trustee at any time after the deed was made," I do not feel that this could be done so as to abrogate such a provision as that embodied in the deed of trust under consideration, after the lien rights of appellants had attached. I think that such provision, in effect, withheld any power of sale being given by the trust deed of the property of J. Lacy Black and wife conveyed thereby,

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except upon condition that all of the lands of J. T. Black thereby conveyed should prove insufficient to pay the debt and costs—that is to say, it was in effect a case where the property of J. Lacy Black and wife was not conveyed by such deed of trust subject to any lien of the Bowling debt, except only in the event that the J. T. Black lands conveyed thereby were all insufficient to pay such debt and costs. Therefore, for J. T. Black and J. Lacy Black to be allowed to change such order of sale would be, in effect, to allow them to execute and record a new deed of trust, with materially and vitally different terms from the first deed of trust, giving unconditional power of sale for the benefit of the Bowling debt. This of course could not be done after the third deed of trust under which appellants' liens attached, so as to take away from appellants their lien as fixed by such third deed of trust.

This is a different case from that of a deed of trust with the usual provisions unlimited by such a provision as we find here. In the case of a trust deed with only the usual provisions, there is nothing which prevents any of the property conveyed thereby from being liable to be subjected by sale, subject to the discretion of the trustee as to the order of sale. The trustee is left by the deed of trust in such a case free to exercise such discretion. In the case before us the trust deed did not leave the trustee free to exercise such discretion, but in express terms withheld from him such discretion, by providing, in effect, that the property of J. Lacy Black and wife should not be sold by him at all save only upon a certain single specified condition, which condition could not be ignored or changed by the trustee, or indeed by the parties themselves to the deed of trust, to the injury of appellants after the rights of the latter as subsequent lien creditors attached to such property.

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Richmond.

BRENHAM AND OTHERS v. SMITH AND OTHERS.

November 16, 1916.

1. INFANTS' LANDS—*Suit for Sale—Failure to Comply with Statute—Void Decree.*—In a suit for the sale of infants' lands under chapter 117 of the Code, where it appears that the bill was not verified and no answer was filed by the guardian *ad litem* in proper person of the infants, nor by the infants over the age of fourteen years, and there were other vital defects in the proceedings, the court was without jurisdiction to decree a sale of such lands, and such decree, the sale, and all proceedings thereunder are utterly void and without effect, and may be assailed directly or collaterally. Substantial compliance with the statute is essential to the validity of the proceedings.
2. JUDICIAL SALES—*Sales After Six Months from Date of Decree—Void Decrees—Code, Section 3425.*—The provision of section 3425 of the Code that the title of a purchaser at a judicial sale shall not be affected by the reversal of the decree under which the sale was made, if it was made under a decree, after six months from the date thereof and the sale was confirmed, has no application to a void decree. The statute cannot be held to infuse life into decrees which were void at the date of their rendition.

Appeal from a decree of the Circuit Court of Buchanan county. Decree for the defendants. Complainants appeal. *Reversed.*

The opinion states the case.

Chase & Daugherty, for the appellants.

Flannagan & Boyd, for the appellee.

KELLY, J., delivered the opinion of the court.

This was a suit in equity brought by the guardian of certain infants to obtain a decree for the sale of lands belong-

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ing to his wards. The bill alleged that one W. P. McGlothlin owned land completely surrounding that which was the subject of the suit, and had made an offer thereon which was probably more than any one else would pay. The court ordered a sale and directed a special commissioner to make the same either publicly or privately, as he might deem most advantageous, and at a price not less than the offer made by McGlothlin. After more than six months had elapsed from the date of the decree authorizing the sale, the commissioner sold the land to McGlothlin at the price he had offered and the sale was confirmed.

Subsequently, after one of the children had died intestate, the survivors filed a bill of review asking to have the sale set aside on the ground, among others, that the proceedings under which the decree was rendered were fatally defective and that, therefore, the court was without jurisdiction and its decree and the sale thereunder null and void.

Upon a hearing the circuit court entered a decree to the following effect: "It appearing to the court that the statutes governing the sale of infants' lands were substantially complied with, and that the sale of land in said suit was made six months after the decree authorizing and directing sale, and that said sale was afterwards duly confirmed, the court is of opinion that the title to said land can not now be affected." The bill of review was accordingly dismissed at the cost of the complainants, and thereupon this appeal was obtained.

It will be observed that the circuit court was of opinion that there had been a substantial compliance with the requirements of the statutes authorizing the sale of infants' lands, and *for that reason* was further of opinion that the title of the purchaser was protected by the statute (Sec. 3425 of the Code) which provides that, "if a sale of property be made under a decree or order of a court after six months from the date thereof, and such sale be confirmed,

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though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

If the state of the record had been such as to warrant the circuit court in holding that there had been a substantial compliance with the statutes covering sales of infants' lands (Chap. 117 of the Code), then we would have no difficulty in affirming its decree. We think, however, that the court's premise was wrong, and that the proceedings were fatally defective. The original bill was not verified at all, there was no answer by the guardian *ad litem* in proper person, the record did not satisfactorily show that there was any answer in proper person by the infant defendants who were over fourteen years of age, and there were other vital defects in the proceeding. We do not understand it to be seriously contended in this court that there was a substantial compliance with the statute, and whether so contended or not we are clearly of opinion that there was no such compliance. In other words, the case does not belong in the class of cases to which the court assigned it, and in which there were formal and unsubstantial defects and errors; but it belongs to that other and equally well recognized class in which mandatory requirements of the statute have been ignored, the jurisdiction of the court thereby defeated, and the proceedings rendered null and void for all purposes. To be more specific, the case comes clearly and squarely within the influence of the opinion delivered for this court by Judge Buchanan in *Coleman* v. *Va. Stave Company*, 112 Va. 61, 70 S. E. 545, in which he uses the following peculiarly pertinent language:

"In this State a court of equity has no authority under its general jurisdiction as guardian of infants to sell their real estate whenever it is to the advantage of the infants to do so, whether for reinvestment or for their mainte-

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nance and education. See *Faulkner* v. *Davis,* 18 Grat. (59 Va.) 551, 98 Am. Dec. 698; *Rhea* v. *Shields,* 103 Va. 305, 49 S. E. 70; *Rinker, &c.* v. *Streit,* 33 Gratt. (74 Va.) 663; *Gayle* legislature, *Faulkner* v. *Davis,* 18 Gratt. (59 Va.) 651, 669-680, 13 S. E. 195. * * *

"It is insisted that, as the statutes authorizing the sale of lands of persons under disability are highly remedial, it is the rule of decision to give them a liberal construction so as to advance the remedy and support the policy of the legislature. *Faulkner* v. *Davis,* 18 Gratt. (59 Va.) 651, 669-70, 98 Am. Dec. 698; *Vaughn* v. *Jones,* 23 Gratt. (64 Va.) 444, 486; *Rhea* v. *Shields,* 103 Va. 305, 309, 49 S. E. 70.

"What was said in those cases had reference rather to the subjects sought to be sold in which infants were interested than to the procedure by which the sales were effected. While this court has frequently held that mere formal defects in the frame of the bill (as in *Cooper* v. *Hepburn,* 15 Gratt. (56 Va.) 551), or in the answer of the guardian *ad litem,* or as to the time when the bill is verified by the oath of the complainant (as in the case of *Durrett* v. *Davis,* 24 Gratt. (65 Va.) 302, 310-12), do not vitiate the proceedings, it has never held, so far as we know, that the mode of procedure provided by statute in such cases must not be substantially complied with. * * *

"It seems to be settled law, that when a new jurisdiction is created by statute and the mode of acquiring and exercising that jurisdiction by the court upon which it is conferred is prescribed by statute, a substantial compliance therewith, at least, is essential, otherwise the proceeding will be a nullity. See note to *Crepps* v. *Durden,* 1 Smith's *Lead. Cases* (5th Am. Ed.) pp. 832-3, and cases cited; *Pulaski Co.* v. *Stuart Buchanan Co.,* 28 Gratt. (69 Va.) 872, and cases cited; Brown on Jurisdiction, sec. 3-a."

The foregoing discussion by Judge Buchanan, and the authorities cited therein, to which many more of like tenor

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and effect might be added, are conclusive of the proposition that the Circuit Court of Russell county was without jurisdiction to render the decree assailed herein, and that the same was null and void.

The question, therefore, for this court to decide is whether section 3425 can be successfully invoked by a purchaser who has bought land under a void decree. There would seem to be but one answer to the question, and that answer in the negative. It is quite true, as the appellee contends, that the question did not arise in *Coleman* v. *Virginia Stave Co., supra,* but a consideration of that case will, as we think, leave no room to doubt that, if the question had arisen therein, the section would have been held inapplicable. The opinion in that case, which is so manifestly and convincingly right and so abundantly supported by authority, is, as we conceive, conclusive of the question in hand. The result in that case cannot be reconciled with the contention that section 3425 is available to the purchaser in the instant case. Both in the case cited and in the present one, the trial courts were without jurisdiction, the decrees were still-born, and the sales thereunder necessarily void. By no refinement of reasoning or interpretation can the section in question be held to infuse life into decrees which are void at the date of their rendition. The lower court, as is manifest from the wording of its decree, had no such idea.

Jurisdiction to hear and determine the cause must exist before any decree or judgment therein can have any vitality whatever. The decree which was held void in *Coleman* v. *Virginia Stave Co.* was as worthless *ab initio* and *in toto* for want of proper procedure as a judgment by one adult against another in the absence of process against the defendant. There can be no substantial distinction between a void judgment rendered in a cause belonging to the general equity powers of the court and one rendered in a cause

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belonging to its special powers under a statute creating new jurisdiction. In every case there must not only be jurisdiction of the person and the subject matter, but the person and the subject matter must be brought before the court in a manner authorized by law; otherwise the judgment or decree is void and not merely erroneous or voidable, and may be set at naught either by a direct proceeding in the cause in which it was rendered or by a collateral attack. These propositions are elementary and fundamental and are recognized as law everywhere. If it is permissible to cite authority for principles so long and well settled, see *Anthony* v. *Kasey*, 83 Va. 338, 340, 5 S. E. 176, 5 Am. St. Rep. 277; *Waldron* v. *Harvey*, 54 W. Va. 608, 46 S. E. 603-5-6-, 102 Am. St. Rep. 959; Freeman on Judgments, sec. 117; Black on Judgments (2nd ed.), sec. 218; and the multitude of cases cited in 8 Va. & W. Va. Digest, page 549; *Id.* vol. 16, page 7660.

We do not find anything in the history or in the phraseology of section 3425 to conflict with the views above expressed. Section 3425 appeared among the statutes of the State for the first time as section 8 of Chap. 51 of the Code of 1849. The revisors of the Code of 1849 recommended the adoption of this statute and made the following note in connection therewith:

"Under the decision of the court of appeals in *Cocke* v. *Gilpin*, 1 Rob. (40 Va.) 20, every decree for sale is *interlocutory*, and the title of a purchaser, twenty years or more after his purchase and the payment of all his purchase money, may be overthrown by subsequent proceedings in a suit in which he is not a party, and of which he knows nothing; and where there are infants in the case, his title may be impeached, even after a greater length of time, under circumstances equally unjust and oppressive. We think this evil ought to be guarded against. If it be deemed proper, it may be required that when the lands of infants are sold

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the court shall require bonds to refund, in case the decree of sale should be reversed or set aside on rehearing or review."

This note of the revisors is not, as we apprehend, of any very great significance in the present inquiry. If we were dealing with a case of mere formal defects, even though sufficient to warrant a reversal of the decree of sale but not going to the jurisdiction of the court, then the note would make even plainer the already plain purpose of the act to protect purchasers whose titles are acquired under erroneous and voidable decrees. All such purchasers, whether under general or special proceedings, are within the reason and within the legitimate scope of the act. But the case in hand belongs, as we have seen, to a wholly different class; and certainly there is nothing in the recommendation of the Revisors to sustain the contention of the appellee here. Their recommendation was called forth by reason of the hardship on the purchaser resulting from the decision in *Coke* v. *Gilpin*, 1 Rob. (40 Va.) 20. The purchaser's title in that case depended upon a voidable and not a void decree, and the suit was not one involving the sale of infants' lands under the statutes then in existence and now found in chapter 117 of the Code, but was a case belonging to the general jurisdiction of equity in which some of the defendants happened to be infants. Such cases are not unusual. It very frequently happens, for example, that infants are defendants in a suit to sell land for debts. As to all such cases, the suggestion of the revisors, made for the protection of infants, that "if it be deemed proper, it may be required that when the lands of infants are sold the court shall require bonds to refund, in case the decree of sale should be reversed or set aside upon rehearing or review," would be natural and germane. No such provision would have been appropriate, however, so far as infant parties are concerned, with reference to sales under the

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special statutes then and now in force, because these statutes have always provided for carefully safeguarding and reinvesting the proceeds for the benefit of the infant. So, it is manifest, that in so far as section 3425 is applicable to sales under chapter 117 of the Code, it is so applicable, not because the draftsman of the statute had such sales especially in mind, but because some such sales may fall within its reason and terms. It seems to us reasonably clear from the language used in the note of the revisors, and from the wording of the statute itself, that, as originally conceived and as finally phrased, it had in contemplation merely such decrees of sale as might be reversed or set aside *for error* on rehearing or review, and did not have in contemplation sales made under void decrees, which, whether the defendant was an infant or an adult, might be absolutely ignored and attacked collaterally without any direct proceeding on the part of the defendant to have them annulled or set aside otherwise.

To be sure, the statutes for the sale of infants' lands and section 3425 are to be liberally construed, to the end that the mischief aimed at may be suppressed; but we must not press this rule of construction to the unreasonable extent of creating an evil worse than the mischief sought to be averted. So far as the statutes for the sale of infants' lands are concerned, it will not be questioned that the primary and controlling consideration underlying their enactment was the welfare of the infants whose lands are to be sold; and in construing section 3425 we may not fairly impute to the legislature any purpose to ignore or contravene that consideration. Quoting again from *Coleman* v. *Stave Co., supra:* "We have not been unmindful of the fact that sound policy requires that judicial sales should be sustained as far as possible consistent with the rights of others, and that innocent purchasers are favorites of the law, but infants are also favorites of courts of chancery; they are not

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only incapable of conveying their real estate but are incompetent to consent to any of the proceedings provided by law for its disposition. In such a proceeding as the one involved in this case, they stand in the position of hostile parties to it, and are treated as objecting to every step taken therein."

The mandatory requirements of the statute providing for the sale of infants' lands were all manifestly thought by the legislature to be essential to the protection of infants; they have been scrupulously and sacredly observed and enforced by the courts; and it is, as we have seen, settled law in Virginia that a substantial compliance with them is just as indispensable as process is against an adult in an ordinary suit. Indeed, the procedure in such cases is process itself. To hold that a decree rendered in disregard of these requirements of the statute, and, therefore, clearly void, can be given life and force by merely waiting until enough time has elapsed to allow section 3425 to operate upon it, is simply to convert a statute intended to protect infants into an instrument fraught with the gravest danger to them. For example, in the instant case, one of the grounds of attack on the sale is that it was fraudulently procured. We do not think that the evidence sustains this charge, but that very fact illustrates the danger to which we have adverted. Fraud is often difficult to prove, even when all parties are *sui juris*, and if the safeguards of the statute may be utterly disregarded and the effect of such disregard cured by section 3425, then indeed has the way been made easy whereby an infant may be defrauded of his inheritance.

If it be suggested that the legislature is a law unto itself in regard to the special jurisdiction created by it, and has the power to do directly what the appellee claims it has indirectly done in section 3425, an entirely sufficient answer is that when the legislature is ready to say that the provis-

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ions of chapter 117 of the Code are not to be accorded the vital importance established for them by the overwhelming weight of authority, that body may be depended upon to say so in terms much more direct and unmistakable than any which can now be worked out of the provisions of section 3425 of the Code. As the law now stands in Virginia, an affirmance of the decree appealed from would as clearly be a taking of property without due process of law as the enforcement of a judgment in ejectment rendered without process on, or appearance by, the defendant.

The Virginia decisions relied upon by counsel for appellee cannot be accorded the effect claimed for them. These cases are *Cooper* v. *Hepburn*, 15 Gratt. (56 Va.) 551, *Dixon* v. *McCue*, 21 Gratt. (62 Va.) 373, and *Lancaster* v. *Barton*, 92 Va. 615, 24 S. E. 251. In the first of these, *Cooper* v. *Hepburn*, the purchaser was seeking relief which was denied him, the court expressly holding, among other things, that there had been a sufficient compliance with the statutory requirements for the sale to give jurisdiction for the decree assailed by him. The opinion, by Judge Daniel, shows that he regarded the decree as being, at most, merely erroneous and voidable, but not void. The opinion was rested upon other grounds, the reference to section 3425 was not necessary to the decision and would not be binding authority here if the two cases were alike, and, finally, the two cases are not alike, for the plain reason that in *Cooper* v. *Hepburn* there had been a substantial compliance with the statute. This clear and vital distinction between that case and cases like the one at bar is shown by Judge Buchanan's reference to and classification of it in the quotation we have already made from *Coleman* v. *Virginia Stave Company*.

The case of *Dixon* v. *McCue* was one falling within the general jurisdiction of the court, was not influenced or affected by the special statutes relating to the sale of infants'

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lands, and the decree under which the sale was made, if erroneous at all, was merely voidable and not void.

In the case of *Lancaster* v. *Barton*, this court held, in so far as the decree of sale was attacked on the ground of defects in the procedure, that there had been a substantial compliance with the statute. The opinion in that case did not intimate that section 3425 would have given life to the decree if there had been such defects in the procedure as would have rendered it void at the time of its pronouncement. Having in mind what the court regarded as merely formal defects, insufficient to defeat the jurisdiction, it went still further and held that the irregularities complained of were not sufficient even to constitute reversible error, and then added that if the objections raised by the appellants had been well founded, "they cannot operate to the prejudice of the purchasers, inasmuch as the sale was made more than six months after the date of the decree of sale, and was duly confirmed. The rights of the parties are now fixed and the purchasers are fully protected by section 3425 of the Code." In other words, the most the court could have done would have been, not to declare the decree and sale null and void, but merely erroneous and voidable, and if it did that the result was the same as an affirmance because section 3425 would protect the purchaser and a reversal of the decree could give the infants no other relief than "a restitution of the proceeds," which, of course, they already had reinvested under the orders of the court. It would, therefore, have been useless for the court to reverse the decree, even if it had found, as it did not, reversible error. The case would have been very different if the court had thought that there had been a substantial non-compliance with the statute, for then it would have held that the decree was null and void, and would have restored the land, as we shall do in the instant case, to the infants from whom it was taken without due process of law. *Lancaster* v. *Barton*

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is not in conflict with the conclusion we have reached, as is further shown by the fact that not one of the cases cited to support the opinion related to a void decree.

It cannot be, we think, successfully contended that the three cases which we have thus reviewed have established any rule of property in support of the appellees' contention. A purchaser would be taking a long chance to rely upon these cases as settling his right to invoke the provisions of section 3425 in defense of a title procured by him under a decree of sale which, when rendered, was void for want of jurisdiction.

The conclusion which we have reached upon this point renders it unnecessary to consider the other assignments of error.

The decree must be reversed, and this court will proceed to enter such decree as the lower court should have entered.

Reversed.

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Richmond.

BRISTOL TELEPHONE CO. v. STOCKTON'S ADMINISTRATOR.

November 16, 1916.

1. MASTER AND SERVANT—*Warning Inexperienced Servant.*—It is the duty of the master to adequately warn an inexperienced servant of unknown dangers attendant upon the place and work to which he is assigned; but the master is not an insurer of the servant's safety, and is liable for the consequences, not of danger, but of negligence.
2. MASTER AND SERVANT—*Injury to Servant—Allegation of Negligence—Lack of Instruction—Burden of Proof—Presumption.*—In an action to recover for a negligent injury, the burden is on the plaintiff to prove the negligence alleged. In the absence of evidence to the contrary, the master is presumed to have discharged his affirmative duties to his servant in furnishing him a reasonably safe place and appliances in and with which to work, and also in giving him necessary warning and instruction. Where the negligence alleged is the failure of the master to instruct the servant how to adjust his belt, or how to sit or work in the belt so as to "balance" or "control himself" while swinging there, and there is no evidence on the subject, but the servant was fully warned of the dangers of the employment, judgment should be given for the master. He can safely rely upon the presumption in his favor, and leave the burden upon the servant to overcome that presumption. Negligence of the master cannot be inferred from the mere occurrence of the acident by which his servant is injured.

Error to a judgment of the Circuit Court of Washington county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Powell, Price & Simmonds, for the plaintiff in error.

Hutton & Hutton, White, Penn & Penn and *J. B. Cox*, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

While plaintiff's intestate was at work in the employment of the telephone company, stringing telephone wires and attaching them by means of clips to a cable fastened to a line of poles along Boone street in Johnson City, Tennessee, his foot came in contact with a heavily charged electric wire strung on a cross-arm beneath the cable, attached to the pole near which Stockton was working, and he was killed. The administrator brought this action to recover damages for the death of his intestate, which he ascribes to the negligence of the company.

At the close of plaintiff's evidence the defendant demurred thereto, which demurrer was overruled and judgment rendered on the conditional verdict for $8,000, the damages assessed by the jury.

The case involves no new principle of law, and the facts are undisputed. The grounds of negligence alleged are, (1) the conduct of the defendant in directing plaintiff's intestate, an inexperienced man, to ascend the pole to clip cable in proximity to high power wires; and (2) that the instruction and warning given to plaintiff's intestate by the defendant of the dangers of the employment were not as full, timely and complete as ordinary care demanded.

The material facts are these: Stockton was twenty-two years of age, of good intelligence and physique. He was doing farm work at his home with his father, in Washington county, Virginia, at the time of his employment; three years before the accident he had worked for the defendant for about five weeks in putting up telephone lines, and before that time had done some work on a country line for a long distance telephone, and had learned to string telephone wire and to climb poles, "and handled himself all right like a man who knew what he was doing." He had worked for

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a year or two as a section hand on a railroad, and in 1911 procured for Gwaltney (the line foreman in charge when the accident happened) a job with the defendant, and Gwaltney in turn employed him for the defendant. Until the time of the accident Stockton had had no experience in working in proximity to heavily charged wires or in clipping cable. He commenced work on the afternoon of May 11, 1914, stretching a messenger wire that the cable is hung to. This work was on Boone street where he was killed the next morning. At that point the messenger wire and cable of the defendant were strung on two poles belonging to the Tennessee Eastern Electric Company, and below these wires cross-arms were attached to the poles upon which the high power wires of the latter company were stretched. Before climbing the pole the first time Stockton was warned by a fellow workman, Rumley, that the wires on the cross-arms were hot wires and if he touched any one of them it would kill him, and he was told not to touch them. After being thus warned and instructed, plaintiff's intestate climbed up the pole through these charged wires to the messenger wire, where he worked that afternoon, and came down the same pole in safety at the close of the day.

On the following morning about six o'clock, Stockton again went to work at the same place and continued work until the time of the accident, about ten o'clock. Before he and his fellow workman, Rumley, climbed the pole, the latter again told him not to touch any of the high power wires. Gwaltney, the foreman, who was standing on the ground, also, before he went up, told him to be careful when he got among them, that the wires were hot and if he touched them they would kill him; and he again cautioned him after he had ascended the pole to be careful—"He told him they would kill him before he climbed the pole, and after he climbed the pole he told him to be careful."

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On that morning Stockton went up the pole, passing through the high power wires, and later came down and ascended the pole again before the accident occurred, each time passing through the high power wires in safety. After climbing the pole the last time, he fixed his seat on the messenger wire running from the pole he had climbed to a pole on the opposite side of Boone street, at an angle of 45 degrees from the messenger wire, which passed to other poles in the opposite direction on the same side of Boone street; the line of the messenger wire as it crossed the street carried it further and further away from the high power wires. The seats used by Stockton and Rumley were those commonly employed in that sort of work, the ends of the safety belt being fastened by snaps to the messenger wire slipped along as the work progressed. A board seat with notched ends was placed in the swing made by the belt, upon which the occupant sat. Stockton got in the safety and started out on the messenger wire in the direction across Boone street, and Rumley, after showing him how to make the first clip, set to work clipping cable on the other side of the pole in the opposite direction. Stockton had only made the one clip and was about three feet from the pole when the accident happened. He was sitting facing the high power wires, which even at that distance from the pole were not directly beneath him but to one side. Rumley, on the other side of the pole, was working immediately over hot wires, and says there was plenty of space between the messenger wire and the high power wires for him to sit up in the belt and not touch them. Stockton was given the safer place where, the wires being to one side, there was greater space between them and the messenger wire. While in that position the end of his foot came in contact with a live wire and he was instantly killed.

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From this summary of undisputed facts it is plain that the defendant was not guilty of actionable negligence upon either of the grounds alleged in the declaration. The two propositions are so concatenated that they cannot intelligently be considered separately.

There is no warrant in the evidence for the premise that plaintiff's intestate was an "inexperienced boy." He was a well developed man physically and mentally, and though he had never clipped cable in proximity to high power wires, he was not without experience as a lineman in the construction of telephone lines, and was "a very good pole climber, and handled himself all right, like a man who knew what he was doing." To hold that a master could not assign such a servant to the duty of clipping cable, after having given him full instruction and warning of the danger from contact with highly charged wires occupying a lower zone on the same pole, without incurring unconditional liability in case accident should befall him, would be to raise the standard of duty of the master to the servant from that of ordinary care to insurer of his safety. The establishment of such doctrine would lay an embargo on the employment of servants in all inherently dangerous vocations, and outlaw many businesses which are essential to the needs and comfort of mankind. It is unquestionably the duty of the master adequately to warn an inexperienced servant of unknown dangers attendant upon the place and work to which he is assigned; but the master is not an insurer of the servant's safety, and is liable for the consequences, not of danger, but of negligence. *Riverside Cotton Mills* v. *Green,* 98 Va. 58, 34 S. E. 963; *Southern Ry. Co.* v. *Moore,* 108 Va. 388, 61 S. E. 747.

Complaint is made that plaintiff's intestate was not sufficiently instructed as to the danger of the place in which he was to work; yet the dangerous character of the wires was fully explained to him, and he was repeatedly warned

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that contact with them would kill him. For all practical purposes a polytechnic course in electricity could not have done more. The measure of information needful to be imparted by the master to the servant for his safety largely depends upon the subject. To instruct a servant how to operate complex machinery may call for long continued training under an experienced teacher, while a word of warning may be quite sufficient to guard an intelligent adult against danger from contact with a heavily charged wire. The one demands skilful performance, the other merely avoidance. It is but juggling with words to say that if the foreman had said to plaintiff's intestate, "Keep your feet up," it would have been sufficient warning (as is conceded by counsel), and yet, in the same brief, to argue that repeated warnings from the foreman and a fellow workman that "these are hot wires and if you touch any of them they will kill you," was insufficient. The evidence shows that Stockton had conscious knowledge of the dangers of the place and work, and that the accident resulted from his momentary inadvertance or thoughtlessness in suffering his foot to come in contact with a charged wire.

The point was also stressed that Stockton was not sufficiently instructed as to the use of the belt. This contention is founded upon a misconception of the application of the rule with respect to the burden of proof. The doctrine is elementary that the burden is on the plaintiff to prove negligence; and, moreover, that the master, in the absence of proof to the contrary, is presumed to have discharged his affirmative duties to his servant in furnishing him a safe place and safe appliances in and with which to work, and, also, in giving him necessary warning and instruction.

It was developed by the plaintiff in his evidence in chief and emphasized by the defendant on cross-examination that Stockton was fully warned of the dangers of the employment. And there is no evidence in the record that he was

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not likewise instructed in the use of the belt and balancing himself on the wire. It merely appears that having been fully warned of the danger, he climbed the pole, adjusted the belt and seemingly handled himself with more than ordinary skill. In these circumstances, in the absence of all proof on the subject, no obligation rested on the master to introduce evidence; he could safely rely on the legal presumption that he had discharged his duty in that regard to his servant, and leave the burden, where the law placed it, upon the plaintiff to overcome that presumption.

That ground of negligence was charged in the declaration and constituted an essential part of plaintiff's case, and the consequence of his failure to prove it must be visited upon him and not upon the defendant. These propositions are too elementary and well settled to require elaboration.

In *Jacoby Co.* v. *Williams,* 110 Va. 55, 65 S. E. 491, 494, Cardwell, J., in delivering the opinion of the court, at page 64, said: "In all cases of the class to which this belongs it is held that negligence on the part of the employer cannot be inferred from the mere occurrence of the accident by which his servant is injured; the presumption being that the master has discharged all of his legal duties to his servant, and this presumption can only be overcome by affirmative proof." Citing *Moore L. Co.* v. *Johnson,* 103 Va. 88, 44 S. E. 557, and *Va. I. C. & C. Co.* v. *Kiser,* 105 Va. 705, 54 S. E. 889.

In *Martin* v. *Carter Coal Co.,* 75 W. Va. 653, 84 S. E. 574, one count in the declaration charged a failure to warn and instruct plaintiff's decedent, a boy about fifteen years old, who was employed by the defendant as a brakeman in its coal mine and was killed by the parting of a train of coal cars. The court, reversing the judgment against the defendant, through Poffenbarger, J., said: "There was no effort to prove lack of instruction and warning. In the absence of proof to the contrary, the law presumes the mas-

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ter has performed every duty imposed upon him by the law. Labatt Master & Servant, sec. 1599."

So far as we are advised the authorities are practically one way on the general proposition. As in the West Virginia case, so in this case, "there was no effort to prove lack of instruction and warning." It is true an opinion witness (not, however, defendant's foreman, as is inaccurately stated) did say that it would require skill for a man to sit in a belt and balance himself; yet this self-evident observation is wholly beside the mark upon the question of failure to instruct.

It is plain that without fault on the part of the master, so far as the record discloses, the servant's death was proximately due to his own negligent disregard of repeated warnings, and for such self-imposed injury the law affords no redress.

The principles controlling this case are too familiar and well settled by the uniform course of decision in this court to render further citation of authority necessary. We will, however, call attention to the case of *Templeton's Admr.* v. *Lynchburg Trac. Co.*, 110 Va. 853, 67 S. E. 351, which is undistinguishable from and conclusive of the present case.

The judgment must be reversed, the demurrer to the evidence sustained, and judgment rendered for the Bristol Telephone Company.

SIMS, J., dissenting:

I cannot concur in the above opinion that the action of the court below in overruling the demurrer to evidence and entering judgment for the plaintiff in accordance with the verdict of the jury should be reversed.

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I think the opinion right in so far as it holds that the defendant in the court below gave sufficient *warning* to the plaintiff's intestate; but it owed an equal duty to such intestate, either not to have exposed him to the risk of performing the duty in the performance of which he came to his death, knowing, as it did, that he had absolutely no experience therein, or to have used ordinary care to have *instructed* him in the proper manner of the performance of such work before exposing him to such risk.

In 1 Shearman & Redfield on Negligence (6th ed.), sec. 219-a, the learned authors say: "The principles governing the employment of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant, to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter."

In the case of *Reynolds* v. *Railroad Co.*, 64 Vt. 66, 24 Atl. 134, 33 Am. St. Rep. at pp. 910-11, it is held: "When an employer engages one to perform a dangerous service, which requires caution and the exercise of peculiar skill, knowing that he is without experience and ignorant of its dangers, it is the duty of the employer to give the employee *suitable instructions* and warnings as to the dangers he is likely to meet in the performance of the services he is engaged in, and is required by the employer to perform. The defendant does not seriously contend against this rule, but insists that at the time of the accident it was using all reasonable means to instruct the plaintiff as to the duties of his position, the dangers of the work, and how to avoid them. But this very fact was one that the plaintiff had the right to have the jury pass upon, for the court cannot say, as matter of law,

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that the defendant was fulfilling its duty in respect of instructions."

In the case of *Am. S. Co.* v. *Fost,* 12 Ind. App. 421, 39 N. E. 891, as taken from a note in 44 L. R. A. at p. 83, it was held: "Granting that the findings show that the appellee had been sufficiently warned of the perils and dangers attending the performance of his duties, it still remains true, as found by the general verdict, that he was ignorant of the nature of his work, and of the manner of the proper performance of the same. There is nothing in the answers returned by the jury to indicate that appellee had received *such instructions* as he should have been given, in order to understand fully the character of the work he was to perform, and the proper manner of performing the same. It may have been true, therefore, that just prior to the injury the appellee was warned 'to be careful,' and 'look out for his hand;' and yet with the reasonable exercise of his faculties, he might still have been unable to so perform his duties as to avoid the danger. Simply warning the appellee of danger generally by the appellant did not excuse the latter from pointing out the particular danger of this employment, and *to so instruct* the appellee as to enable him to avoid such danger. Nor is the finding that the appellee was so warned in conflict with the implied finding in the general verdict that the appellee did not receive any instructions from the appellant or its servants concerning the duties he had to perform, and the dangers and hazards attending his employment, at the time of the injury. A warning to an ignorant and inexperienced man, under such circumstances, would be of little avail."

In *Giebell* v. *Collins Co.,* 54 W. Va. 518, 466 S. E. 569, it is held: "It is the duty of the master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or

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want of capacity of the servant, and, failing to do so, he is liable for the damage suffered through such neglect."

That skill acquired by experience was necessary to fit the plaintiff's intestate to perform the duty in question without being exposed to unreasonable danger to himself, is affirmatively shown by the testimony of several witnesses for plaintiff.

The evidence in this case shows that defendant knew that the plaintiff's intestate had never before sat in a belt or clipped a cable, even where not exposed to the danger of coming in contact with a live wire. Yet it gave him absolutely no instruction as to how to adjust his belt or how to sit or work in the belt so as to "balance" or "control himself" while swinging therein (as the testimony in the case shows affirmatively, as I view it, or certainly as the jury were warranted in inferring from the evidence, and hence upon demurrer to evidence must be regarded by the court as the fact in this case). Never having had any experience whatever in working swinging in a belt, or in adjusting the strap which lifted or lowered him, he was ignorant of the extent of the danger to which he was exposed. No amount of warning as to the existence of the danger, if he came in contact with the live wire, could inform one without some such experience of the difficulty of avoiding coming into such contact. This the testimony for plaintiff shows the defendant must have known. This the plaintiff's intestate did not know. With this knowledge on the defendant's part, and with its further knowledge of the absence of such knowledge on the part of the plaintiff's intestate, the defendant exposed the plaintiff's intestate to the risk it did, without, as above stated, giving him any instructions whatever.

Whether the defendant in such conduct was guilty of failure to exercise reasonable care for the safety of its said employee was a question of fact for the jury.

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This court, in the case of *Mason* v. *Post*, 105 Va. 494, 54 S. E. 311, 11 L. R. A. (N. S.) 1038, said: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done, under the circumstances of the situation; or doing what such a person, under existing circumstances, would not have done. The duty is dictated and measured by the exigencies of the occasion."

As was said in *Fisher* v. *C. & O. Ry. Co.*, 104 Va. at p. 639, 52 S. E. 374, 2 L. R. A. (N. S.) 954: "The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in the case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of affairs is such that reasonable men may differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

Or, as stated in the case of *Milton* v. *N. & W. Ry. Co.*, 108 Va. 763, 62 S. E. 961: "In brief, it may be said that, if upon a demurrer to the evidence, the evidence is such that a jury might have found a verdict for the demurree, the court must so find, and grant judgment in his favor, * * * (cases cited). And, further, where reasonably fair-minded men might differ about a question, such question must be decided against the demurrant on a demurrer to the evidence."

As was said by this court in the late case of *Norfolk* v. *Anthony*, 117 Va. at p. 777, 86 S. E. 68: "It is furthermore well settled by the Supreme Court of the United States and this court by practically an unbroken line of decisions, that negligence only becomes a question of law, to be taken from the jury, when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men,

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from the proof submitted, may honestly differ, as to the negligence charged, the question is not one of law, but one of fact, to be determined by the jury under proper instructions from the court."

I am of opinion that there was ample evidence in this case to warrant the jury in finding that in the aforesaid conduct of the defendant it was guilty of a failure to exercise reasonable care for the safety of its said employee. The court below was of this opinion and overruled the demurrer to evidence by the defendant and entered judgment for the plaintiff. I think the lower court was right, and that the case should be affirmed on this point.

In the case of *Templeton's Admr.* v. *Lynchburg Traction Co.*, referred to in the majority opinion of the court, there was no question of inexperience or of duty to instruct.

Reversed.

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Richmond.

CHESAPEAKE & OHIO RAILWAY CO. v. MERIWETHER AND OTHERS.

November 16, 1916.

1. RIPARIAN OWNERS—*Protection Against Floods—Embankments—Injury to Others—Overflows—Railroads.*—A railroad company has the right to change the location of its tracks from one part of its right of way to another along a water course, and to construct its embankments sufficiently high to protect its road bed and other property from injury by accidental and extraordinary floods, and if, as a result thereof, the property of other riparian owners is injured by such floods, no liability therefor attaches to the railroad company.

Error to a judgment of the Circuit Court of Amherst county, in an action of trespass on the case. Judgment for the plaintiffs. Defendant assigns error.

Reversed.

The opinion states the case.

Harrison & Long, for the plaintiff in error.

Aubrey E. Strode and *William Beasley*, for the defendants in error.

WHITTLE, J., delivered the opinion of the court.

In the trial court the positions of the parties were reversed; defendants in error were plaintiffs and the plaintiff in error defendant. The case in outline is as follows:

The alleged cause of action is that the defendant, by changing the location of its roadbed and track and building an embankment or fill along its right of way on James river in Bedford county, unlawfully narrowed the channel and lessened the space for the flow of the stream in high

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water and changed its natural course, and thereby, during a freshet in the spring of 1913, flooded plaintiffs' farm on the opposite side of the river in Amherst county and its island in the river and inflicted the injuries of which they complain. The case was tried upon that theory and resulted in a verdict for the plaintiffs for $1,400, upon which the judgment under review was rendered.

Prior to the year 1910, the defendant's track at the point in question was located at the foot of a bluff on a sharp curve, to avoid which, during that year, the railway company relocated its tracks nearer the bank of the river for the distance of 1,750 feet, in part upon the embankment of the tow-path of the old James River and Kanawha Canal Company, to whose property rights the defendant succeeded. This old tow-path was twelve feet above low water mark, and the new embankment was raised to the height of twenty-five feet from the same level.

Admittedly, the change of location and increased elevation of the embankment exerted no influence whatever upon the flow of the river at ordinary stage, since the base of the latter was ten feet distant from low water mark and the intervening space was traversed by a wagon road. The low-grounds on plaintiffs' farm were only six or seven feet above low water mark.

The evidence, we think, indisputably places the freshet of 1913 in the class of "accidental or extraordinary floods," such as from the observation and experience of men of ordinary prudence familiar with the river would not reasonably be expected to occur. In the memory of the oldest residents in that vicinity there had only been two other freshets that approximated the flood of 1913 in magnitude, namely, the "great freshets" of 1870 and 1877; and all of them were characterized as "extraordinarily high freshets," the highest that had ever been seen in the river. The records of the water power department of the railway company also

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showed that the height of the water at Clifton Forge in the 1913 flood was 28.4 feet, and that it was 25 feet at the point of defendant's embankment and 24.6 feet at Lynchburg, eight miles further east. These facts in the opinion of the engineer at the head of the water department showed "a tremendous accumulation of water at Clifton Forge which caused that phenomenal rise above what had been there before, and in consequence of which the water came down in a great volume at high speed between those two points, much more so than had been at previous freshets." It was also in evidence that the freshet of 1913 rose faster, came quicker from the mountains, rose more rapidly, was swifter in flow and quicker in fall than was the case with its two great predecessors.

In these circumstances, confining our decision to such injury as was inflicted upon plaintiffs' land by reason of the construction of the embankment in its effect, if any there was, on the flood of 1913, we are of opinion that it imposed no liability on the defendant.

The case of *Cubbins* v. *Mississippi River Commission*, decided by the United States Supreme Court at October term, 1915, Adv. Op., July 15, 1916, p. 671, 241 U. S. 351, 36 S. Ct. 671, 60 L. Ed. 1041, is decisive of the questions here involved. Mr. Chief Justice White, delivering the opinion of the court in that case (after stating the general rule, "that the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors, in consequence of their right to enjoy the same, were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow, or causing additional burdens by changing it,") observes: "But while this was universally true, a limitation to the rule was also universally recognized by which individuals, in case of accidental or extraordinary floods,

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were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection." The learned Chief Justice maintains these principles by reason and authority, showing that the general rule and its limitation were recognized by the Roman law, the Code Napoleon, the law of Scotland and England, and also of this country. Although in this country, he remarks, "it is true to say that much contrariety and confusion exist in the adjudged cases as to when it is applicable, some cases extending the rule so far as to virtually render the limitation inoperative, others extending the limitation to such a degree as really to cause it to abrogate the rule itself. But in these differences and contrarieties it is not at all necessary to enter, since there is no decided case, whatever may be the differences as to the application of the limitation, holding that it does not exist, and when in fact the very statement of the general rule requires it to be determined whether that rule as correctly stated would include situations which the limitation, if recognized, would exclude."

The evidence, as we view it, plainly brings this case within the influence and protection of the limitation to the general rule. The railway company was within its rights in changing the location of its tracks from one part of its right of way to another to escape the danger incident to a "14 per cent curve," and in constructing its embankment sufficiently high to protect its roadbed and other property from injury by *accidental and extraordinary floods.*

It follows from what we have said that the judgment of the court below is erroneous and must be reversed and the

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case remanded for further proceedings not inconsistent with this opinion.

SIMS, J,, disenting:

I cannot concur in the view that the decision of the United States Supreme Court in the case of *Cubbins* v. *Mississippi River Commission,* cited in the majority opinion of this court, is applicable to and controls the decision of the case before us.

The former case was a suit by the owner of a piece of land on the east bank of the Mississippi river, adjacent to Memphis, Tennessee, on behalf of himself and of others owning similar land in the same locality against the Mississippi River Commission, created by act of Congress, and fifteen local State levee boards, operating on the river between Cape Girardeau, Missouri, and the mouth of the river at the Gulf of Mexico, three of these boards being organized under the laws of Missouri, four under the laws of Arkansas, one under that of Tennessee, one under the law of Mississippi and six under the law of Louisiana.

The following further statement of this case is taken from the opinion of the court:

"It was alleged that in flood seasons, when the water in the Mississippi river rose above its natural low-water banks, such water would flow out and over the vast basins in which the alluvial valley between Cape Girardeau and the Gulf formed itself, and would then, either by percolation gradually flow back into the river, or be carried over and through the basins by the streams flowing through them into the Gulf of Mexico, where such streams emptied. It was further alleged that the land of the complainant, when the river in the flood periods was thus permitted to discharge its waters, was so situated that it was beyond the reach of overflow from the river. It was then alleged

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that in 1883 the Mississippi River Commission, acting under the authority of Congress, had devised a plan known as the Eads Plan, by which it was contemplated that on both banks of the river, except at certain places, which were stated, a line of embankment or levees would be built which, in times of high water or flood, would hold the water relatively within the lines of the low-water banks, thus improving navigation by causing the water to deepen the bed, and saving the country behind the levees from inundation. It was averred that, to further this plan, the various State levee boards, which were made defendants, were organized, and that all of them, within the scope of their power and the limits of their financial ability, had aided in carrying on this work, and that, as the result of their work and of the levees built by the Mississippi River Commission, it had come to pass that from Cairo to the Gulf, a distance of about 1,050 miles, on both sides of the river, except at points which were stated, there was a continuous line of levees restraining the water from flowing out into the basins, as above stated, and which, in many instances, cut off the outlets connecting the streams which drained the basins and ultimately carried off the water to the Gulf. It was charged that this line of levees as a whole had been virtually adopted by the Mississippi River Commission, which body had assumed control of the whole subject, and that such body and all the State agencies co-operating were engaged in strengthening, elevating, reviewing, repairing, and increasing the lines of levees so as to more effectually accomplish the purpose in view.

"It was charged 'that the effect of the closing by the defendants of the natural outlets along the said river, and the confining of the flood waters between the levee system as a whole, is to obstruct the natural high-water flow of the water of said river in and along its natural bed for its entire length, thereby raising the level of the water to such

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an extent that said flood waters, within the last five years, have attained a sufficient height to flow over complainant's land, and when there is not a high-water stage in said river, the waters of said river accumulate, flow over, and remain standing upon and over said lands of complainant to a depth of from 4 to 8 feet, so that complainant is now being interrupted in the profitable use, occupation, and enjoyment of his said land.' And it was further alleged that 'said land is being covered with superinduced additions of sand, silt, and gravel, now from 6 inches to 3 feet in depth; the houses and fences thereon are being washed away, rendering the said land and the houses thereon unfit for occupancy, driving away the tenants, doing irreparable harm and injury to said land, impairing its usefulness, causing the practical destruction thereof, and destroying its market value.'

"It was averred that to obstruct the river as alleged was a violation of the legal rights of the complainant, since he was entitled to the natural flow of the river within its natural high or low-water bed, free from interference by the acts of the defendants. Averring that no proceedings had been taken to expropriate the land, and that no offer to pay for the same had been made, and that the acts complained of constituted a taking without compensation, in violation of due process of law under the Constitution of the United States, and that there was no adequate remedy at law, the prayer was for an injunction against the Mississippi River Commission and all its officers, employees, agents, and contractors, wherever found, and against all the local levee boards and their officers, employees, agents, and contractors, perpetually prohibiting them from further building any levees, from enlarging, strengthening, repairing, or doing any act to maintain the levees already built, and for general relief.

"The bill was amended by alleging that the overflow of complainant's land, as averred, instead of having happened

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within five years, had occurred within one year, and the original prayer was added to by asking that if it was found that the injunction prayed could not be granted, the case be transferred from the equity to the law side, and be converted into a law action to recover from the Yazoo-Mississippi Delta Levee Board, the local Mississippi Board which alone of the defendants had been served, the sum of $500,000 as the value of the plantation alleged to have been wrongfully taken.

"A motion by that corporation was made to dismiss the bill on the ground that it stated no basis for relief, and in any event it alleged no ground for equitable jurisdiction, since at best, upon the theory that a cause of action was stated, there was plainly an adequate remedy at law. On the hearing the motion to dismiss was joined in by the Mississippi River Commission, and the case is here as the result of the action of the court below in dismissing the bill for want of equity."

As expressly stated by the learned and eminent judge in his opinion in such case, the subject was considered "looking at it in a two-fold aspect: First, with reference to the rights and obligations of the land owners and the power of the State to deal with the subject; and, second, with reference to the power of the United States to erect levees to confine the water for the purpose of improving navigation, as superimposed on the right of the land owners or that of the State authorities to construct such levees, if such right obtains, and if not, as independently existing in virtue of the dominant power to improve navigation vested in Congress under the Constitution."

I can but feel that what is said in such a case in reference to a situation where there was statutory provision on the subject, national and State, comprehending an immense plan of beneficial improvement, adequate to compel the general erection of levee works sufficient therefor, is not

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applicable or of controlling force where there has been no legislation on the subject—no general or legislative policy on the subject, existing or declared—and where the inevitable result of allowing one proprietor to erect such works on his land to protect his property from the result of accidental or extraordinary floods would be to compel another riparian owner to erect similar works on his land as a necessary means of defense. This would result in spasmodic individual action here and there and in great hardship and injustice before any co-ordinate and efficient system on the subject could be evolved.

It will be observed that the case of *Cubbins* v. *Mississippi River Commission* applies a different rule as applicable to the question of liability of one riparian owner to another for erecting a levee or embankment by the former on his own land to protect it from the overflow of the river, from that which has heretofore obtained in Virginia, and a great number of other States.

This rule, as laid down in the case of *American Locomotive Co.* v. *Hoffman*, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773, as stated in its syllabus, is as follows:

"A lower riparian owner has no right to pen back or obstruct the flow of a water course so as to flood the lands of the upper owners * * * due care should be taken not to obstruct the natural flow, including such rises as are usual and ordinary and reasonably to be anticipated at certain seasons of the year. But a lower proprietor is not bound to take precautions against extraordinary freshets which human sagacity cannot foresee nor human experience foretell. * * *"

This rule, in each case of asserted liability against a riparian land owner for his action in building a levee or embankment for the purpose aforesaid, where injury would be occasioned another riparian land owner only in the event of an extraordinary flood, which flood in fact occurred, re-

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duces the inquiry to this: Could the flood which occurred and which occasioned the injury complained of have been foreseen or anticipated by the exercise of ordinary foresight? If the fact be that by the exercise of such foresight the defendant could have foreseen or anticipated that such a flood would occur, he is liable for the injury done by the flood resulting from such levee or embankment being erected—otherwise not; whereas, the rule of the United States Supreme Court case cited and above referred to is precisely the opposite, namely, in effect: That if the fact be that the defendant does foresee and anticipate that such a flood will occur, he may build the levee or embankment to protect his own property and he is *not* liable for the injury done by the flood resulting from such levee or embankment being erected.

The latter rule had its origin in the civil law and has not been adopted in any of the States except in Louisiana, where the civil law is in force, so far as I have been able to find. I do not understand that it is meant to say in the extract from the United States Supreme Court case contained in the quotation therefrom in the majority opinion above, that the civil law rule above referred to has been adopted generally in this country. This is made manifest by reference to the various State cases cited in such opinion as containing "the limitation" referred to. These cases are the following: *Burwell* v. *Hobson*, 12 Gratt. (53 Va.) 322, 65 Am. Dec. 247; *Cairo, V. & G. R. Co.* v. *Brevoort*, 25 L. R. A. 527, 62 Fed. 129; *Crawford* v. *Rambo*, 44 Ohio St. 279, 7 N. E. 429; *O'Connell* v. *East Tennessee, V. & G. R. Co.*, 87 Ga. 246, 13 L. R. A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; *Taylor* v. *Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Shelbyville & B. Turnp. Co.* v. *Green*, 99 Ind. 205; *Mailhot* v. *Pugh*, 30 La. Ann. 1359. An examination of all of these cases shows that in no one of them, except in the Louisiana case of *Mailhot* v. *Pugh*, 30 La. Ann. 1359, was the civil law

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rule under consideration adopted or applied. Among the cases cited on this subject in such United States Supreme Court opinion is *Burwell* v. *Hobson,* 12 Gratt. (53 Va.) 322, 65 Am. Dec. 247. The nature of that case will appear from its syllabus, which is as follows:

"H, owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W, the land on the north side; and in their report they made no allusion to the dike. The son receiving the land on the south side of the creek, afterwards sold it to B; and then W owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H, and overflow the low grounds on the south side. B then filed a bill to enjoin the building of the dike on the north side. *Held:*

"1. B is entitled to have his dike as it was when H died, and to have his lands protected thereby; and W has no right to build a dike on his side of the creek, which would destroy the dike of B, and overflow his low grounds.

"2. Equity will interfere to prevent the building of the dike; and will compel W to abate so much of his dike already built as would injure the dike and low grounds of B."

Moncure, J., in delivering the opinion of this court in that case, said in part:

"The maxim *sic utere tuo ut alienum non laedas* emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons.

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This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee.

"But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction, is, that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. Angell on Water Courses, sec. 333. But he has no right, for his greater convenience and benefit, to build any thing which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them. *Id.* sec. 334. If, in the case of such an obstruction, it appears that the injury therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, he is liable for the damage. *Id.* sec. 349. That the supposed distinction does not exist was expressly decided by the Court of King's Bench in *Rex* v. *Trafford,* 20 Eng. C. L. R. 498. Tenterden, C. J., in delivering the judgment of the court in that case, said, 'Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant

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quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction.' *Id.* 502. The judgment in that case was reversed in the Exchequer Chamber. *Trafford* v. *Rex,* 21 Eng. C. L. R. 272. But that court agreed in the principle laid down by the Court of King's Bench, though it did not discover, upon the special verdict, a finding of sufficient facts to warrant its application to the case.

"It is often the mutual interest of adjacent riparian proprietors to agree to erect works on their respective lands to protect them against floods, and keep the water at all times in its natural channel. That interest is generally sufficient to bring them to such an agreement. But in the absence of agreement express or implied, or of any statutory provision on the subject, the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public, and will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense. Each has the exclusive right to judge and act for himself on this subject; taking care not to injure the property of the other."

The last paragraph of this quotation is especially pertinent to the question under consideration, namely, whether the civil law rule applied in the United States Supreme Court case above cited, is properly applicable in this State, where there is an "absence * * * of any statutory provision on the subject," and where "the law furnishes no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public," and where I think the law, as it still is, "will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense."

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It would seem that where "a limitation" is referred to in the opinion of the United States Supreme Court case above mentioned, and where it is said, "In this country it is also certain that the limitation is recognized," it is meant merely to say that there is in all countries "a limitation" in some form placed upon the liability of individuals for erecting "such works as would protect them from the consequences of a flood by restraining the same." It was not meant to say, because that would have been contrary to the fact, that in all countries, including our States, the civil law rule above referred to is applied. This statement does not controvert the fact, which is the fact, that in most of our States "the limitation" upon such liability is fixed by the rule in Virginia above adverted to.

It may be noted in passing that Indiana puts into effect "a limitation" such as above referred to by considering the flood waters of rivers extending beyond their ordinary channel as surface waters, and applying the common law rule with respect to surface waters thereto, namely, that each land owner affected thereby may fight such waters as a "common enemy"; and hence deduces the result that in that State a riparian owner may erect an embankment on his own land to ward off the flood waters both of ordinary and extraordinary floods from overflowing his lands (see Indiana cases cited in *Cubbins* v. *Mississippi River Commision, supra*); which is not the rule in Virginia, nor is it the rule of the civil law applied in the *Cubbins' Case.*

Again: I do not think the case before this court is one where the erection of the embankment by the defendant was in furtherance of any purpose to fight a "common enemy," such as the sea or extraordinary floods, by restraining them within their banks—which is contemplated by the civil law rule above referred to, and to those entertaining which purpose alone such civil law rule extended its protection against individual liability for damages. The purpose

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of the defendant in the case before us was undoubtedly "not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks," which was the purpose the civil law rule was intended to conserve (see *Cubbins* v. *Mississippi River Commission, supra,* at p. 676); but it constructed its embankment for its individual benefit alone, without any idea of public benefit. As is said in the case of *Pappenheim* v. *Metropolitan, &c. Co.*, 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401, 26 Am. St. Rep. 486, in reference to a defendant claiming immunity under a Georgia statute authorizing a general system of levees on unnavigable streams (having a like public beneficial purpose to that of the civil law rule adverted to above) it "constructed an embankment on which to lay its track, without regard to any consequences of benefit or injury to the contiguous country."

For the reasons given above, I do not think that the case of *Cubbins* v. *Mississippi River Commission, supra,* is applicable to and should control the decision of the case before us. And since its application to such a case makes such a radical and far-reaching change in the law of Virginia on the subject, I feel constrained to note my dissent from the majority opinion, although I am of opinion that the assignment of error relied on by counsel for defendant with respect to instruction No. 7, given by the court below, is well taken and that the case should be reversed on that ground, if not upon others.

Instruction No. 7 was as follows: "If the jury believe from the evidence that the embankment on the new location of the track opposite the lands of the plaintiffs narrowed the natural channel of the waters of the river at normal stages, and at such flood stages as are defined in others of these instructions, and that by reason of such embankment damage accrued to the lands of the plaintiffs,

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then as a matter of law the defendant was guilty of negligence as contemplated by these instructions and the defendant is liable in damages for the loss so caused to the plaintiffs."

This instruction concluded with a direction of a verdict for the plaintiffs in effect. Flood stages of ordinary as well as extraordinary floods are defined in others of the instructions. This instruction, therefore, in effect directed a verdict for plaintiffs, although the jury found from the evidence that damage accrued to the lands of the plaintiffs only from an extraordinary flood of a character which would not have been foreseen or anticipated by the exercise of ordinary and reasonable foresight on the part of defendant.

As this is a minority opinion it is unnecessary for it to discuss any other assignment of error.

Reversed.

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Richmond.

CHESAPEAKE & OHIO RAILWAY CO. v. REBMAN & CLARK.

November 16, 1916.

1. CARRIERS—*Failure to Deliver Stock—Damages—Agreed Valuation.*—Under a bill of lading fixing a value upon live stock and providing that in no event shall the shipper recover a greater sum, the shipper is entitled to recover any damage less than such valuation which he can prove resulted from delay in delivery, although he realized in the market more than the amount of such valuation. This rule applies as well to negligent failure to deliver, as to delay in delivery.
2. CARRIERS—*Failure to Deliver Stock—Notice—Reasonable Time.*—Notice to a carrier of a claim for damages for failure to deliver stock is within "a reasonable time" and is sufficient, when given without delay as soon as the negligence of the carrier which occasioned the loss was discovered, although the contract of carriage required notice to be given within five days after the stock were removed from the cars, or within a reasonable time thereafter.

Error to a judgment of the Circuit Court of Craig county in an action of trespass on the case. Judgment for the plaintiffs. Defendant assigns error.

Affirmed.

The opinion states the case.

J. M. Perry, for the plaintiff in error.

Hugh A. White and *D. W. Layman,* for the defendants in error.

WHITTLE, J., delivered the opinion of the court.

We have here under review a judgment of the Circuit Court of Craig county in favor of Rebman and Clark against the Chesapeake and Ohio Railway Company, the defendant below, rendered on demurrer to the evidence.

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The material facts, which are undisputed, are these: On July 16, 1913, the plaintiffs delivered to the defendant at New Castle, Virginia, two carloads of lambs for shipment to Jersey City, New Jersey, under the "Uniform Live Stock Contract" (in force at that time, but since invalidated by the Cummins act of March 4, 1915, amending the interstate commerce act, which interdicts agreements of that character between shippers and carriers), whereby in consideration of a lower freight rate the defendant limited its liability for the lambs to $5.00 per head. The defendant failed to deliver the animals shipped, but in their stead delivered from the cars in which they were loaded at New Castle a different lot of lambs, of an inferior grade and value, to plaintiffs' consignees, who in ignorance of this unaccounted for exchange sold the animals received by them and remitted the net proceeds to their consignors. The plaintiffs, upon discovering the mistake, credited the amount of the estimated value of the lambs lost with the sum received, and, the defendant denying liability, brought this motion to recover $488.60, difference in value between the lambs shipped and those delivered on their account.

Plaintiffs' damages were assessed by the jury at $350, which was less than $5.00 per head for the lambs lost, for which sum the trial court rendered the judgment under review.

1. The main defense pressed in argument is that by the terms of the live stock agreement the liability of the defendant was limited to the $5.00 valuation placed on each of the animals delivered for shipment, which it is said has been discharged from the proceeds of sale of other lambs; but the decision of this court in the recent case of *Norfolk & Western Railway Co.* v. *Steele*, 117 Va. 788, 86 S. E. 124, makes complete answer to that contention. It was there held that, "under a bill of lading fixing a value upon live stock and providing that in no event shall the shipper

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recover a greater sum, the shipper is entitled to recover any damage less than such valuation which he can prove resulted from delay in delivery, although he realized in the market more than the amount of such valuation."

If that be the correct rule with respect to damages arising from mere delay in delivery of live stock, with all the more reason should it apply where from the negligent exchange of animals by the carrier there has been a total failure to deliver.

2. The remaining contention is that plaintiffs should be denied a recovery because "they did not present their claim within five days from the time the animals were removed from the cars, or within a reasonable time thereafter."

If it be conceded that plaintiffs were under obligation to give notice of their demand under the circumstances of this anomalous transaction, the evidence shows that such notice was given without delay as soon as the negligence of the interstate commerce act, which interdicts agreements of defendant which occasioned the loss, was discovered.

Upon both propositions, therefore, the judgment is plainly right and must be affirmed.

Affirmed.

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Richmond.

CHRISTIAN AND OTHERS v. BULBECK.

November 16, 1916.

1. BOUNDARIES—*Ascertainment—Acts 1912, p. 133—Scope of Act.*—The act of March 4, 1912 (Acts 1912, p. 133) allowing a petition to be filed to ascertain the true boundaries of land, confers upon the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court, and the defense of adverse possession for the statutory period may be set up as a defense to such petition.
2. BOUNDARIES—*Location—Acts 1912, p. 133—Ejectment.*—The title of the plaintiff in the case at bar being a fee, and the controversy being with the owners of "coterminous real estate" as to the true location of boundary lines between the plaintiff and the defendants, the plaintiff had the right to proceed under the statute and was not driven to an action of ejectment.
3. BOUNDARIES—*Preference of Corners Over Courses.*—In ascertaining the boundary lines of land, distance or length of lines called for in deeds and plats, and acreage, must give way to fixed and ascertained corners and reputed boundaries established by ancient but distinct land marks
4. BOUNDARIES—*Acts 1912, p. 133—Plaintiff's Title.*—In a proceeding under Acts 1912, p. 133, to fix boundaries and to recover the land lying between the true boundary and the boundary claimed by the defendants, the plaintiff must recover upon the strength of his own title.
5. EVIDENCE—*Boundaries—Plats.*—A plat not referred to in or made a part of the chain of title of either plaintiff or defendants, on the trial of a petition under Acts 1912, p. 133, is not admissible as evidence of the extent or location of the metes and bounds covered by the true title, or of that covered by the color of title of the defendants.
6. ADVERSE POSSESSION—*Taking Possession—Harmless Error.*—In fixing the duration of adverse possession, a party has the right to tack to his possession the possession of those under whom he claims, but the omission to make any reference to this right in an instruction is harmless where the testimony

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is to the effect that the only possession claimed was that of the party himself.

7. INSTRUCTIONS—*Application to Evidence.*—Instructions should be read with reference to the evidence in the case in which they are given. Although correct with reference to a case to which they are applicable, they may be erroneous when applied to a different state of facts.

8. ADVERSE POSSESSION—*Mistake as to Boundary—Claim to Line on the Ground.*—The proposition that adverse possession does not exist where the party occupied and possessed the land in controversy through a misapprehension or mistake as to his boundary, with no intention to claim what did not belong to him, but only intending to claim to the true line, is sound in principle only where in fact there was no intention to hold adversely up to the boundary line *on the ground* unless that were the true boundary. It does not apply where it is shown that a specific intention exists on the part of the possessor to claim title to *a definite line on the ground* in fact beyond the true title. If a party takes and holds actual possession beyond his true boundary line, and with good faith, though mistaken, claims title to and occupies the land, his possession is adverse to the extent of his actual possession, and such possession, if continued unbroken for the statutory period, will ripen into a perfect title under the statute of limitations.

9. ADVERSE POSSESSION—*Mistake as to Boundary—Presumption as to Extent of Claim—Claim with Reference to Line on the Ground.*—Where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line of the ground. That is to say, on the whole proof a case must be presented in which the preponderance of evidence as to the character of the possession, how held, how evidenced on the ground, how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line *on the ground* existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim *as one's own* the land up to a particular and definite line *on the ground* existed, is the practical test in such cases.

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10. BOUNDARIES—*Acts 1912, p. 133—Monuments and Corners Preferred to Lines and Acreage—Instructions.*—In a proceeding under the statute to ascertain the true boundary of land an instruction that "a correspondence in quantity given by a line in question with the quantity mentioned in the deed, or in the approximation thereto, may be considered as going to establish such line as the true one," gives too great prominence to the mere acreage. While it is a circumstance bearing on the establishment of such line, it is of less weight than natural monuments, corners or reputed boundaries and the jury should have been so instructed.
11. INSTRUCTIONS—*Jury Fully Instructed.*—Where a case has been fairly submitted to the jury on proper instructions it is not error to refuse other instructions tendered.

Error to a judgment of the Circuit Court of Amherst county in a statutory proceeding to ascertain the boundary of land. Judgment for the petitioner. Defendants assign error.

Reversed.

The opinion states the case.

Caskie & Caskie, for the plaintiffs in error.

Scott & Meeks and *O. L. Evans,* for the defendant in error.

SIMS, J., delivered the opinion of the court.

This case is a proceeding at law under Acts of Assembly 1912, p. 133, by the appellee, plaintiff in the court below, against the appellants, defendants in the court below, by the following petition:

"Your undersigned petitioner, Marion Bulbeck, respectfully shows unto the court that in accordance with an act of the General Assembly of Virginia, approved March 4, 1912, contained in chapter 74 of the Acts of 1912, page 133, she is filing this, her petition, in your honor's court for the

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purpose of having determined the true boundary line or lines to certain real estate, situated in the county of Amherst, of which your petitioner and C. Burks Christian and Sallie B. Christian, jointly, are the coterminous owners in fee simple, and as to which a dispute has arisen as to what is the true boundary line or lines between your said petitioner and said Christians.

"Your petitioner shows unto the court that by deed dated June 28, 1893, recorded in Deed Book VV, page 57, of Amherst county clerk's office, one John H. Lewis and wife conveyed to your petitioner a tract of 48 acres of land on James river, in Amherst county, it being the same land conveyed to said Lewis by John C. Mundy, trustee, in deed dated October 20, 1891, recorded in Deed Book TT, page 521, of Amherst county, and the same land conveyed to John C. Munday, trustee, by Drewry J. Christian and wife, by deed dated August 20, 1873, and recorded in Deed Book JJ, page 222, of Amherst county, and the same land of which Stephen W. Christian, the father of said D. J. Christian, conveyed his life estate in deed of September 2, 1868, recorded in Deed Book GG, page 194, of Amherst county, and being a part of the same land allotted to Moaning Christian, the grandmother of the said D. J. Christian, and at her death partitioned among her children, a copy of which partition is herewith filed marked 'Exhibit X' (See Will Book No. 9, pp. 416 and 422).

"Your petitioner further shows unto the court that the true location of the lines between her and said Christians has never been fixed and determined and that recently there has been litigation and disputes between them as to what is the proper location of said boundary lines.

"Your petitioner further shows unto the court that one J. C. Fulcher, as tenant of said C. B. Christian and said S. B. Christian, is cultivating, for the present year, a portion of the land, which, as your petitioner alleges and charges, is a

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part of said boundary purchased by her and part of said land which is now in dispute.

"Your petitioner further shows unto the court that said C. B. Christian and S. B. Christian own said adjoining real estate in fee simple as two of the heirs of their father and as grantees of the remaining heirs; that originally the land of your petitioner and said Christians belonging to one Drewry Christian and allotted to his heirs and as dower to his wife Mourning Christian, of whom said C. B. Christian and S. B. Christian are descendants, and at the death of whom the said Mourning Christian was allotted the said tract of land contained in said plot filed herewith as 'Exhibit X', the other lands held by said Christians, adjoining your petitioner's said ..... acres, being part of what was allotted to the heirs of said decedent.

"Your petitioner alleges and charges that the confusion in the location of this line is largely due to the fact that the parties owning the same were related and no action was taken to determine what were the proper lines, and it has only been within the last two or three years that your petitioner was made aware of the fact that the true line had never been located.

"Your petitioner still further alleges and charges that she has made every possible effort to get the said Christians to agree upon the establishment of a line between the properties aforesaid; that she has even gone to the expense and trouble of purchasing the necessary material to build a proper fence so as to secure her own cattle and stock from trespassing and to prevent other people's stock from trespassing upon her, but the said Christians have refused to agree upon a line or to permit her to put up a fence upon any line that has been run by surveyors employed by petitioner, going so far as to threaten violence toward any and all she employed to build such fence.

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"Your petitioner, therefore, asks and prays that this, her petition, shall be considered of by this honorable court at its next civil term, and in the meantime your petitioner asks that a competent surveyor, or surveyors, be ordered and directed to enter upon the premises in question and establish by such survey as may be deemed necessary the true boundary lines between the said several plots of land, the same to be used as evidence at the trial of this case, and that the true line between her and C. B. and S. B. Christian may be determined, and she may be given possession of such land as she is entitled to by the proper location of said line, with such damages for its retention as may be proper in accordance with the statute in such cases made and provided, and that all other proper relief may be granted her."

There was a demurrer to the petition by defendants on several grounds, only one of which, however, is relied on here, which ground is as follows:

"The remedy, if any, of the plaintiff is one in ejectment."

Counsel for defendants, in their petition, in amplifying this ground of demurrer, take the following positions:

"The act approved March 4, 1912 (Acts 1912, page 133), gives the right to any person having an interest in real estate, to file a petition, and 'have ascertained the true boundary line or lines to such real estate as one or more of the coterminous land owners.'

"It is submitted that this act does not substitute the petition therein provided for, for an action of ejectment. A party can not come into court alleging that she has had a survey made of the land, and knows where the true boundary is, and ask the court to confirm her opinion, because, forsooth, some adjoining land owner is unwilling to admit that she is entitled to a piece of land of which he and his predecessors have been in possession for seventy-five years.

"To illustrate: If A owns and occupies a lot which is fenced in and B claims and occupies an adjoining lot, like-

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wise fenced in, A will not be heard by this sort of summary proceeding to have the court determine that his lines embrace B's lot, and dispossess him thereof. If a party does not know where his lines are, he may, by this proceeding, have them ascertained and then institute his proceeding to recover what he does not have in possession if he so determine.

"This view is strongly fortified by the fact that the act contains no provision for possession, or for damages for the unlawful possession. It is impossible to believe that if the intention of the legislature had been to settle all questions of title that it would have failed to provide for a judgment for the possession and for damages.

"Again, the court is restricted by the act to ascertain and designate 'the true boundary line or lines.' What is the '*true* boundary line'? The word 'true' is defined to mean 'real,' 'exact,' 'accurate,' 'correct,' 'right,' and in this sense it is used in the statute referred to. The jurisdiction of the court is to find 'the real line,' 'the exact line,' 'the accurate line,' hence it could not consider any question of estoppel, act of limitations, or any other matter, which, under the law, would allow the party to claim what was not his 'real,' 'correct,' or 'accurate' boundary, and hence the defendant could not avail himself of the admissions of the plaintiff of his claim of title, or color of title, adverse possession or other defenses which the law says avail him, no matter how defective his real, accurate, true title is.

"Where each party claims to know the real, true boundary, and a definite piece of land is in dispute, *the question at issue is not one of boundary, but one of title.*

"This view seems to have been held by the draftsmen of the petition in this cause, who felt called upon to aver therein that the true boundary lines had 'never been fixed and determined' (Rec., p. 3), although he filed with his

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petition a plat which fixes and determines every one of them, and rests the whole case upon the correctness thereof.

"The demurrer should have been sustained, and the plaintiff remanded to the proper action to assert title to the eight acres of land which she claims, but of which the defendants had possession and to which they claimed title."

The court below overruled the demurrer, and such action is assigned here as the first ground of error.

In considering such assignment we are called upon to decide the following questions:

1. Did the act of Assembly, 1912, p. 133, give the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court in a proceeding under that act?

We think it did.

The act is as follows:

"Chap. 74.—An Act to authorize the ascertainment and designation of the boundary line of real estate.

"Approved March 4, 1912.

"1. Be it enacted by the General Assembly of Virginia, That any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said court, the true boundary line or lines to such real estate as to one or more of the coterminous landowners. All parties interested in the coterminous real estate shall be made parties to the said petition which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition.

"The trial shall be conducted as other trials at law and the same rules of evidence shall apply and the same defenses

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may be made as in other actions at law; the trial by jury may be waived by consent of parties, the judgment of the court shall be recorded in the common law order book and in the current deed book of the court, and indexed in the name of the parties to the petition. The court may upon, application of either party to the petition, by order in term time or in vacation, direct such survey or surveys to be made as may be deemed necessary. The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns. The judgment of the court shall be subject to the review by the Supreme Court of Appeals of the State upon writ of error."

The concluding provisions of the act, that "The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns," seem to us to be conclusive of this question and to decide it in the affirmative.

The act also provides that, "The trial shall be conducted as other trials at law and the same rules of evidence shall apply and *the same defenses may be made as in other actions at law* * * *" (Italics ours.) Hence, adverse possession, whether with or without color of title, under a plea of the statute of limitations, is a defense which may be made under such act.

2. As to what "interest in real estate" in the plaintiff is necessary to enable him to institute an action under the statute, or as to what cases of controversy over boundary line or lines of land involving dispute as to the title of the land included therein, the act applies, or as to what other defenses may be made in such a proceeding, we do not at this time decide, because not necessary for the decision of the case before us; except that we are of opinion and do

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decide that the plaintiff in this case appears from the allegations of said petition to have had such an "interest in real estate," being a fee simple interest, as was sufficient to enable her to institute this action under said statute and that as this case, per said petition, involves a controversy between "coterminous real estate" owners as to the true location of boundary lines, which in effect involves a controversy as to the title or ownership of the land included in such boundary lines, it is such a case that the act in question applies thereto.

We are, therefore, of opinion that the court below committed no error in overruling the demurrer.

There was a trial by jury in the case, and a verdict and judgment in favor of the plaintiff, fixing the boundary lines as claimed by the latter as the true boundary lines between her land and that of the defendants; thus, in effect, determining that the land between the lines as claimed by the plaintiff and those claimed by the defendants, consisting of about eight acres, belonged to the plaintiff.

There are the following other grounds of error assigned in said petition:

a. The refusal of the court below to set aside the said verdict and grant a new trial;

b. The refusal of such court to admit in evidence a certain plat found spread on the official surveyor's book of Amherst county of 1803 to ....., p. 116, in what defendants claim was the handwriting of H. L. Brown, who was at one time assistant surveyor of Amherst county, but now deceased, bearing no date or signature of any surveyor, or statement thereon with respect to the identity of the land it included, except the lines of the plat and courses and distances thereon and natural landmarks noted thereon, such as James river, Christian's island, the acreage of the latter as 13½ acres, "up the branch", "Gate at the Dwelling House" &c., "Pointers Dogwood, Gum & White Oak," "White

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Oak," &c., designating lines and courses, the general outline and shape of the land covered by such plat being similar to the outline and shape of the outside lines of a plat introduced in evidence by plaintiff, made in 1837, September 15th, by H. L. Brown, assistant surveyor of Amherst county, as Exhibit X with her petition, the latter plat being signed by him and showing the division of the Mourning Christian dower land into lots—the former plat being claimed by defendants to be a plat of the said dower land made when it was assigned to said widow, but no report of such assignment or order of court, or deed or other writing was introduced in evidence, either by defendants or plaintiff, which refers to such former plat or authenticates it as binding on any of such parties to this suit. It should be said also that the length of one important boundary line of said dower land as given on the plat not admitted in evidence is different from the length of such line as given on said plat introduced in evidence by the plaintiff.

c. The giving of certain instructions, A, B, C and D, for plaintiff.

d. The refusing of certain instructions numbered 1 to 7 inclusive, offered by defendants.

Before considering the questions arising upon these assignments of error, we will state briefly the salient facts in the case bearing upon such issues.

The plaintiff and defendants derive title from a common source, Drewry Christian, who died in 1818. The following plat shows the dividing boundary lines, which we have indicated by the letters A, B, C, D, E, which are in controversy in this proceeding.

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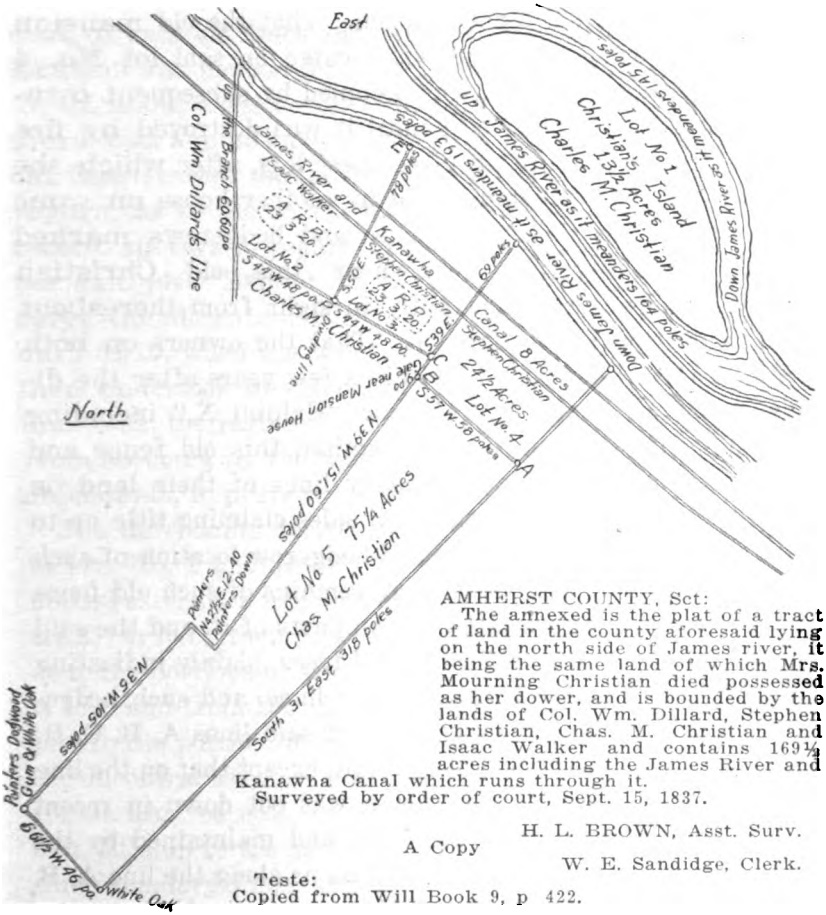

AMHERST COUNTY, Sct:
The annexed is the plat of a tract of land in the county aforesaid lying on the north side of James river, it being the same land of which Mrs. Mourning Christian died possessed as her dower, and is bounded by the lands of Col. Wm. Dillard, Stephen Christian, Chas. M. Christian and Isaac Walker and contains 169¼ acres including the James River and Kanawha Canal which runs through it.
Surveyed by order of court, Sept. 15, 1837.

H. L. BROWN, Asst. Surv.

A Copy
W. E. Sandidge, Clerk.

Teste:
Copied from Will Book 9, p 422.

Plaintiff derived title as alleged in her petition to lots No. 3 and No. 4 shown on such plat, and there is no conflict in the evidence that for about sixty-seven years prior to this suit, that is, up to about three years before such suit, neither the plaintiff nor any of those under whom she claims title, exercised any acts of ownership with claim of title beyond the location on the ground of the lines A, B, C, D, E, as marked by an old rail fence, from a very early time, not definitely fixed by the evidence, and later by a well defined hedgerow of trees and other growth, such as plainly

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indicated a very old fence location. That the old mansion house of Drewry Christian was located on said lot No. 4 near the corner C, which was occupied by subsequent owners of lots No. 3 and No. 4 until it was destroyed by fire soon after the plaintiff acquired these lots, after which she or members of her family lived in another house on same premises. That these old fences and hedgerows marked lines were therefore very near this old Christian family residence and constantly in sight from thereabout and in passing to and from it. That the owners on both sides of these lines back to within a few years after the division of land shown by said plat "Exhibit X," including the plaintiff, up until 1910, recognized this old fence and hedgerow as the outside boundary lines of their land on both sides of it, respectively, both sides claiming title up to and only up to such old fence and hedgerow location of such lines. That about 1893 there were remains of such old fence apparent along such location, or on parts of it, and the said hedgerow, or growth of bushes and trees, plainly indicating an old fence location all along these lines, and such hedgerow remained along the most part of said lines A, B, C, D, E, down to the institution of this suit, except that on the line from D to E most of the growth was cut down in recent years; but a wire fence was built and maintained by the plaintiff from about the year 1893 on or along the line A, B, C, D, E, on said lots No. 3 and No. 4 partly inside but practically along and on the site of said old fence and hedgerow location, until the institution of this suit. Plaintiff located this wire fence in ignorance of the true location of said boundary lines A, B, C, D, E, in accordance with her title as claimed by her since 1910. If such boundary lines were located on the ground, as the plaintiff claims they should be, which she claims is the true location thereof according to said plat, "Exhibit X," they would extend some one hundred and fifty feet to the northwest, north and north-

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east of said old fence and hedgerow and of said wire fence location and include the land in controversy, above referred to, of about eight acres. Plaintiff furnishes no proof that there was any mistake made in the original location of the old fence except the testimony of Garland and DeMott, surveyors, as to the conclusions reached by them from their recent surveys in regard to the true location of such lines per said plat "Exhibit X." It appears that she did not discover the alleged mistake in the location of her wire fence until 1910, when she was having some surveying done, and then undertook to extend her fence out to such boundary lines—as thereafter claimed by her, and was prevented from so doing by the threat of Col. C. B. Christian, one of defendants, to prevent by force this being done.

The defendants derived title by descent and conveyances to lots No. 2 and No. 5, and the land adjacent and to the northwest and north of these lots, known as the "Burks tract," tracing their title back also to said plat "Exhibit X" as to the portions of said lines A, B, C, D, E, which lay from A to B and from D to E, and tracing their title back of such plat to the portion of said lines which lay from B to C; and the uncontradicted proof is that they claim and have claimed, for at least seventy years prior to the institution of this suit, title up to the said old fence and hedgerow location of said boundary lines, and they claim also that such is the true location of such lines according to said plat "Exhibit X."

In the chain of title of defendants, prior to the said division of said dower tract and plat, "Exhibit X," there is a deed from Mary Burks and husband of date January 9, 1818, which conveyed to C. M. Christian, the father of defendants, the said "Burks tract." The Burkses derived this land from Drewry Christian in the division of his land in 1818, when the Mourning Christian dower tract was also assigned.

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The testimony for defendants of C. G. Massie, surveyor, which is uncontradicted, is to the effect that he surveyed the Burks tract, and that by such actual survey its boundary line next to land of plaintiff extends on the ground to the points B, C, D, of the said line A, B, C, D, E, as their location is claimed by defendants, being the same location as said old rail fence and hedgerow on such portion of such line.

The Burks deed, therefore, gave the defendants color of title, if not title, to that portion of the strip of land in controversy which lies from B to C to D, along the said line A, B, C, D, E. If the true location of the line A, B, C, D, E, as designated on said plat "Exhibit X" was as claimed by defendants and as shown by said old rail fence and hedgerow, the Burks deed gave to the father of defendant and also to those claiming title under him by descent as aforesaid, title to such line. If the true location of such line was as claimed by plaintiff, still, as the metes and bounds called for in the Burks deed extended beyond and over the line as claimed by plaintiff to the line as claimed by defendants, it gave the latter color of title to such location on the ground of the line B to C to D, as claimed by them.

As to the possession of defendants, it is deemed sufficient to say that regarding this case as upon demurrer to evidence by defendants, the evidence for defendants as to possession is not of that specific and definite character which is essential to prove the *pedis positio*, or actual possession, of the strip of land in controversy, or any part of it, for the statutory period, necessary for the application of the bar of the statute of limitations where the defendants have no title or color of title. That is to say, such testimony goes to the extent of proving open, notorious, actual, hostile and uninterrupted or continuous possession by defendants for at least seventy years only of some portion of the Burks tract, which, under said title or color of title, gave them construc-

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tive possession up to the said line B to C and C to D, portions of line A, B, C, D, E, as claimed by defendants, and also only of some portion of lots 2 and 5, which if the true title lines thereof are as defendants claim, would give them constructive possession up to A to B and D to E, portions of the line A, B, C, D, E; but the testimony does go to that extent. On this subject, and as to the Burks tract and also lots 5 and 2, Col. C. B. Christian, one of defendants, who was in his eightieth year when he was on the witness stand, testified as follows:

"Q. Colonel, how long have you and your sister held this land of yours, I mean especially the strip of land" (in controversy) "and how have you held it, if you did hold it? A. We have held it adversely for seventy years to my knowledge and I believe for many years before that by my forefathers, certainly back to the Drewry Christian division of 1815 or 1818, had uninterrupted possession, notorious, open and actual against Miss Bulbeck and the world * * *"

* * * * * * *

"Q. Do I understand you to say that you and your sister have had adverse possession of all the land on your side of Miss Bulbeck's fence (when I say adverse you as a lawyer know what I mean) for the last seventy years? A. I do."

It is true that this was a statement of a conclusion of the witness and not of the specific facts on which the conclusion was based, but it was not excepted to and the other testimony in the case does not contradict its accuracy in so far as it refers to possession of parts of lots 5 and 2 and the Burks tract not included in the strip of land in controversy.

Col. C. B. Christian's testimony therefore shows the possession above indicated by him and his sister with the definite and unconditional claim of title and ownership on their part, and the intention to so claim title to the line A,

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B, C, D, E, as located on the ground per the old rail fence and hedgerow.

Miss Sallie B. Christian's testimony shows the same, only she adds: "Of course, we did not want any land but that which belonged to us; we would not have any land other than that that belongs to us, we intended only to hold to the true line wherever it was."

Now as to the location on the ground of the "Gate near the Mansion House," called for as a corner on said plat, "Exhibit X," and the actual location on the ground of the line A, B, C, D, E, in accordance with such plat. Col. C. B. Christian is not contradicted in his testimony that he remembers this line as far back as "seventy years at least since I can first remember," which would place his personal recollection back to 1843, six years after said plat "Exhibit X" was made; and he says: "These lines are as near as can well be where Miss Bulbeck's present fence is, * * *"

"Q. How do you know this? A. I know it by surveys properly located, and also by what * * * Uncle Stephen Christian, who owned Miss Bulbeck's lands, as well as what Drewry J. Christian, his son, all of them told me. They all said the rock or gate referred to in H. L. Brown's plat of Mourning Christian's dower * * * shows the true corner and starting point, and the only known or well established corner between these lands. These old people all recognize this as the corner, and this rock is not a movable rock, but is one called a tight rock, and juts out on top of the land, and the lines between our lands and Miss Bulbeck's land take this rock as a corner, and run approximately with Miss Bulbeck's present fences, and were so recognized as the true lines by our family, and Uncle Stephen Christian, who owned lots No. 3 and No. 4, and at his death fell to his son, D. J. Christian, my first cousin. At or within a few feet of this rock was a gate, and I remember that there one of my aunts, who was riding horseback through this gate,

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going over to Uncle Stephen's house (which was later burned, after Miss Bulbeck bought it) was thrown from her horse and broke her hip, and she was an invalid the balance of her days."

Mr. Garland, a civil engineer, was appointed by the court below to survey and report upon the lines in controversy. He reported in favor of the lines as claimed by plaintiff, and testified that in his opinion such location is the true location on the ground of such lines. He filed a plat showing thereon in yellow lines the location on the ground of such lines as claimed by defendants and in red line the location on the ground of such lines as claimed by plaintiff.

Mr. Garland's testimony pertinent to the issues in this case was as follows:

"I am surveyor and engineer by profession, live in Lynchburg, and have had several years' experience as such, and am a graduate of Virginia Military Institute. * * * At the request of Col. C. B. Christian I started at what is known as the rock corner, near Miss Bulbeck's residence, claimed by the defendants as the corner, and ran the lines first northeast, and thence to the river, which lines approximately in shape and location fitted the present fences between Miss Bulbeck and the Christians, that is I mean the line between the Burks tract of north 48 poles or the old line north 44 east, 48 poles to corner of lot No. 2; thence S. 46 east 78 poles, or the old line south 50 east 78 poles, the difference being in bearing to corrected change on account of the variation in needle of instrument in time of two surveys, and I found these two lines approximately fitted the present fence on the ground. I then ran from the rock corner north 35 west 9 poles, and thence south 61 west or the old bearing, south 57 west, 58 poles towards S. B. Walker's line, which distance ran over the fence between Walker, Bulbeck and Christian at the northwest corner of Marion Bulbeck's ——— poles. I then started at the end

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of north 44 east 48 poles, between lots No. 2 and No. 3, supposed corner of Christian and Bulbeck, and extended the line north 44 east 48 poles, and I did not reach the branch in plat, corner called for on branch being Col. William Dillard's line on the northeast, which should be the corner of lot No. 2 and the Burks tract in Dillard's line. Then I begun on James river, where there was no corner named, except on river, and ran the line between S. B. Walker's estate and Miss Bulbeck. The distance of Miss Bulbeck not being given I obtained it by my scale on the plat of the partition of Mourning Christian's dower, and by old trees supposed to be the line trees and somewhat with the present fence, and the distance obtained by the scale on the Mourning Christian's dower division I ran the distance shown by this plat I filed with my report, which ran over, on the defendants' lands, as claimed by them. I then ran as indicated on the plat the red lines parallel to the three lines I ran from the supposed rock corner claimed by the Christians over to the branch on the Dillard line on the northeast, the measurements of these three red lines about took me to the branch on the Dillard line. I came back and extended the line from James river on between Walker and the Christians north 27 west distance given by the plat claimed to have been made for the Walker tract from the river, and this distance stopped at an old tree or near it, but I could not discover well defined marks on same. Some claimed it as the corner in the line of lot No. 5, belonging to the Christians, and the corner of the Walker tract. I did not run any of the other lines of the Christians' lands, or the lands of the defendants, notably on the Burks tract and lot No. 5. My conclusion was the red dotted lines are the true boundary lines between the lands of the plaintiff and the lands of the defendants."

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CROSS-EXAMINATION.

By Counsel for Defendants:

"Q. Mr. Garland, your survey and conclusion, as I understand, are the result of starting at James river, at the supposed corner of Walker and Miss Bulbeck? A. Yes, sir.

"Q. If the bank edge of James river has changed since 1815 or 1818, the date of the division of the old Drewry Christian estate and the present bank, or where you started, is not the true or correct starting point, then are your conclusions and survey correct? A. Of course if the river has changed, and my starting point wrong, the location of the red lines on my plot would also be wrong.

"Q. In locating the lines from the supposed rock corner northeast, claimed by the Christians as the true corner, did Col. Christian not point out to you what he claimed to have been the location of an old barn on the northwest side and about half way of the line north 44 east 48 poles, which barn he claimed to have been there from the time he could remember up to several years ago, and which he claimed was a few feet on his side of the true line, between him and Miss Bulbeck. If this barn was on his side of the true line, as claimed by him, then the line as located by you was through the barn site or location on Miss Bulbeck's side was it not? Would not this show that your conclusion is wrong? A. Well, it might."

* * * * * * *

"Q. On your map the yellow lines about correspond, as I understand, with the present fences of Miss Bulbeck, do they not? A. Yes, they do.

"Q. Where you located the red lines on your map, did you find any landmarks whatever fitting the bearings and distances? A. No, I did not.

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"Q. I mean between the defendants and Miss Bulbeck, the plaintiff? A. No."

Mr. DeMott, a surveyor, also testified for plaintiff as follows:

"I surveyed the Bulbeck two lots * * * I ran from the rock as pointed out by Col. Christian, both ways, and my lines practically fitted Miss Bulbeck's fence, as at present. Then I ran the Walker line from the river and came to the conclusion that Miss Bulbeck's line should be located from the river and go out on the Christian side as indicated on Mr. Garland's plat by the red lines; my measurements agreed with Garland's as far as I made them. I made no measurement on the river; I think Mr. Garland's are correct in his survey, and conclusions. I should say that the trees on the river on the Bulbeck side are seventy-five years old.

"You can get lots No. 2, 3 and 4 on the ground; the land is there; Mr. Garland's survey is correct. If rock is right all else is wrong and acreage to Miss Bulbeck is too small and Colonel's too much. My survey and conclusions check with those of Mr. Garland, in every respect. Garland's estimate is correct; a discrepancy of one-fourth of an acre does not mean that the lines are wrong in making such survey. In my judgment Massie is not right and Garland is right. There are indications that James river has not changed from the trees, etc., from 75 to 100 years old. In surveys on rivers like the James the line starts at the low water level and not out in the water. My experience is that in surveying on James river there is very little change in it as evidenced at Pearch and other places. At Miss Bulbeck's land there is an inland that extends up beyond the starting point of her survey which Garland established by the red line, and that island serves to protect her land from washes by the river. I found the Walker line marked, but I found no hedgerows or fences to indicate any ancient line.

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I consider the survey of Mr. Garland made from the records to be better and more accurate than the memory of any man. The white rock basis which C. G. Massie took is unquestionably wrong; Brown never took the rock as a basis and Brown is correct and made a good survey and with him Garland checks. The barn referred to possibly existed in 1818 and Brown ran the line in 1837. Charles M. Christian owned the whole land before the survey. I regard the barn as questionable and it does not stand to prove anything; memory fails and is made to change."

CROSS-EXAMINATION.

"If the river has changed in the last seventy-five years of course the starting point on the Walker line is wrong, and then the conclusions arrived at by Mr. Garland and myself are also wrong."

RE-CROSS-EXAMINATION.

"No one showed me the barn claimed by Col. Christian, or its side. The plat calls for gate but no rock on the H. L. Brown survey of Mourning Christian's dower."

C. G. Massie, a surveyor and witness for defendants, filed a plat locating the lines in controversy A, B, C, D, E, as claimed by defendants. His testimony pertinent to the said issues was as follows:

"I am county surveyor of Amherst county * * * I began the survey at rock or stone claimed by Col. Christian to be the corner near the corn house, supposed to be where the gate is called for near mansion house on H. L. Brown's plat. I ran the lines from that point both ways, and taking that as a corner I found the bearings and distances fitted pretty well the present fence of Miss Marion Bulbeck, thus indicating that whoever put up the fence hit the lines pretty well. I also surveyed the Burks tract, and found evidence

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of an old line in the way of a hedgerow on the northwest side of this tract. Along lines from pointers south 51 W., 31 poles south 38 west 72 1-2 poles, south 52 1-2 east 12 2-5 poles pointers which aided me in my conclusion, in fitting up this tract with the Mourning Christian's dower; that the rock claimed by Col. Christian was a true corner, near the corn house. Then I took into consideration the barn, as claimed by Col. Christian * * * In running the line from the rock near the corn house north 44 east, 48 poles to corner of Christian and Miss Bulbeck; thence south 50 east 78 poles I practically hit the present fence, and the bridge on the canal, and continuing the line north 44 east, 48 poles to the branch on the Dillard line the true distance was 52 poles on the latter line a little short, and running from the rock north 39 west 9 poles, and thence 57 north 58 poles towards the Walker line I ran over what is supposed to be the Walker line several poles, but this happens frequently in old lines. I also ran the line beginning at the corner of Walker and Bulbeck's line on James river between Walker and Bulbeck, but there is no distance given on any plat I have ever seen on this line along with the Bulbeck line. Col. Christian showed me the rock. In making these surveys I did not consider the area of any of these tracts. The question was to locate the lines accurately between the parties. I did not put much faith in beginning at the river bank on the Walker line, as water streams are changeable, especially have I found James river so. I cannot agree with surveyor Garland in his conclusions. * * *"

Examined by Counsel:

"I have had little experience in surveying on James river. The lines in controversy are short when run from the river to Colonel's proposed line on the rock basis. I don't know anything about whether James river has changed or not. There are no marked trees or otherwise, that indicate the Burks line extending from the mansion house. There are

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hedgerows that do not indicate lines. Never ran line from the river near Walker's or the full length of the Walker line. I did not pay any attention to the surrounding lots. * * * I could not see any material change in the branch. I ran around the 23-acre lot, called lot No. 2, but did not calculate the acreage. I did not estimate any acreage, nor did I run the line from the river. The lines are short when run from James river or else you would have to go into James river to get the acreage about 150 feet if the white rock basis is true."

We come now to consider the several assignments of error, which we will take up in their order above stated.

a. The refusal of the court below to set aside said verdict and grant a new trial.

1. We are of opinion that the verdict was contrary to the evidence in this, that the jury found and fixed the true boundary lines in question in accordance with the said survey and plat made by H. G. Garland, and such survey and plat entirely ignored the uncontradicted testimony of Col. Christian as to the location on the ground of the "Gate near Mansion House," and fixed that corner altogether by the length of the lines thereto from the Dillard branch on the one side and the Walker boundary line as this surveyor found it marked on the ground on the other side, giving undue weight to mere length of lines called for on said plat, "Exhibit X," as compared with the monument of the location of the "Gate near Mansion House," evidenced by the "tight rock" in practically the same place, as per Col. Christian's uncontradicted testimony; also in ignoring the existence of the reputed boundary line called for on said plat as marked by the old rail fence and hedgerow along the line in controversy, and making the existence of the present location of the reputed boundary of the Walker line outweigh and set at naught the existence of the old rail fence and hedgerow; also in making the length of the lines

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ending on the river as called for on or ascertained by scale from said plat, "Exhibit X," outweigh the existence of said old rail fence and hedgerow and the facts aforesaid, showing it as the reputed boundary from such an ancient time, namely, for some seventy years, between the adjoining lands and the recognition by owners of lots 3 and 4 prior to the plaintiff of the correctness of the claim of title of defendants up to such line as so located on the ground, and indeed by plaintiff until 1910. It is true that the plaintiff explains why she treated this as her boundary until 1910, namely, because she was ignorant of what recent surveys she had made disclosed, and she also denies that she knew that defendants claimed title up to this old fence and hedgerow location until about the year 1900; but prior to the holding of the plaintiff, which as we have said began in 1893, back to a period of time seventy years before this suit, we have the uncontradicted testimony of said living witness as to the location of the old rail fence and hedgerow lines being recognized and treated by the land owners on both sides of it as the true boundary and delineation on the ground of the extent of their respective titles, as called for in said plat, "Exhibit X." This is proof of even more than a reputed boundary.

As was said by Judge Pendleton in *Shaw* v. *Clements*, 1 Call. (5 Va.) 438, "our juries generally and wisely establish reputed boundaries, disregarding mistaken descriptions."

And in *Herbert* v. *Wise*, 3 Call (7 Va.) 242, it is said: "To pursue the proper description of our land boundaries would render men's titles very precarious, not only from the variations of the compass, but that old surveys are often inaccurate."

As held in *Summerfield* v. *White*, 54 W. Va. 311, 315, 46 S. E. 154, 156, "If a monument called for by the deed is

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established by uncontradicted evidence, it becomes binding upon the parties."

Applying the rule announced in the West Virginia case last cited to the monument, the "Gate near Mansion House," in the case at bar, its location, as testified to by Col. Christian, became established. This corner called for in the plat, "Exhibit X," being thus fixed, that corner became a marked monument; James river was a natural landmark; the reputed boundary of the lands in controversy was marked by the old rail fence or hedgerow. The dividing line in question, when located according to said plat, "Exhibit X," if the corner last mentioned is fixed as next above stated, corresponds on the ground with the line A, B, C, D, E, as claimed by defendants, and the only discrepancies that would then exist between such location and such plat would be the length of the lines of the plaintiff's land, those running from the river northwest being too short by about 150 feet, and the length of the lines running on the one side of such "Gate near Mansion" corner to Dillard's branch being too long by about 99 feet, and on the other side of such corner to Walker's line, as now marked on the ground, too short by about .....feet; and the acreage of the plaintiff's land being about 40 instead of about 48 acres, as called for in said plat. However, the rule on the subject is too well settled in Virginia to need a citation here of the authorities, that in such case distance or length of lines called for on the plat must give way to the fixed corner of the "Gate near Mansion," and the reputed A, B, C, D, E, boundary; that acreage called for must also give way to this data; and the correct location of the boundary line in dispute, according to the well settled rule in Virginia referred to, is the A, B, C, D, E line as claimed by defendants. The verdict of the jury was plainly in conflict with this rule, even regarding the evidence under the rule applicable to demurrer to evidence by defendants.

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2. We are of opinion that the verdict of the jury was contrary to the evidence for the further reason that it ignored the following facts shown by uncontradicted testimony in the case, namely: Even if the true location of the disputed lines, according to the plat, "Exhibit X," under which the plaintiff derived title, was as claimed by the latter, the defendants claimed and derived title to the Burks tract adjoining that portion of such line A, B, C, D, E, from B to C to D under deed to their father in 1818. The metes and bounds of the Burks deed designated lines which by actual survey of Massie, as appears from his testimony above quoted, extended from B to C to D of the line A, B, C, D, E, as located on the ground along the line of said old rail fence or hedgerow. Therefore, the defendants had title, or at least color of title (with possession such as above noted according to uncontradicted testimony for defendants), older than the plaintiff's title to that portion of the strip of land in controversy lying to the west, north and northeast of said portion of said line from B to C to D. Hence, as to so much of the boundary line, and such portion of the strip of land included therein, the verdict of the jury was in the face of the uncontroverted evidence for defendants and absolutely without evidence for the plaintiff to support it, since the plaintiff must recover upon the strength of her own title—as indeed the court below correctly instructed the jury in an instruction not excepted to and hence not herein quoted.

This view of the case results in our having to reverse the action of the court below on the assignment of error under consideration, and the granting of a new trial. Ordinarily such holding would call for no further opinion from us upon the other assignments of error in the case, but as upon a new trial it seems that the following questions raised by such assignments of error will again arise and have to be passed upon by the court below, we feel constrained to deal

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with them here. They will be considered in their order as they arise under the remaining assignments of error above noted.

As to—

b. The refusal of the court to admit in evidence the plat referred to above under this heading.

The court below was right in refusing to admit this plat in evidence. This plat was not referred to in or made a part of any part of the chain of title of defendants or of the plaintiff, and hence was not admissible as evidence of the extent or location of the metes and bounds covered by the true title.

For the same reasons it was not admissible on the question of the extent or location of the metes and bounds covered by the color of title of defendants. *Sulphur Mining Co.* v. *Thompson*, 93 Va. 293, 25 S. E. 232.

c. The giving of certain instructions, "A," "B," and "C," for plaintiff.

Such instruction "A" was as follows: "The court instructs the jury that where one person relies upon the acquirement of land, rightfully belonging to another, by adverse possession, such adverse possession must possess the following elements as shown by a preponderance of testimony; (1) The possession must last during the period of the statute (that is, for fifteen years prior to the institution of suit, concerning lands situated in Amherst county); (2) That such possession should meanwhile have been continuous and uninterrupted; (3) That it must be free from fraud; (4) That it should have been visible and notorious; (5) That it should have been exclusive; (6) That it should have been hostile; and (7) That it should have been actual. And, therefore, as applying to the case at bar, unless the jury believe by a preponderance of evidence that the defendants have held the land in controversy in accordance with said elements or requirements, each and every one,

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then they must find for the plaintiff, so far as the acquirement of title thereto by adversary possession is concerned.

"See Minor or Real Property, Vol. II, page 1103."

1. This instruction disregarded the right of defendants to tack their possession to the possession of those under whom they claimed and derived title. However, in view of the testimony for defendants on the trial of the case, to the effect that such possession as they proved was by themselves, the omission in the instruction of the reference to possession of those under whom they claimed title was not error.

Such instruction "B" was as follows: "The court instructs the jury that where a person occupies and possesses the land of another through a misapprehension or mistake, as to the boundaries of the land, with no intention to claim as his own that which does not belong to him, but only intending to claim to the true boundary line, wherever that may be, he does not hold adversely, and the reason why this is so is because in this State *intention to hold adversely* is an indispensable requisite to adverse possession, and such intention is then wanting; and, therefore, if they believe from the evidence that the defendants occupied and possessed the land in controversy through a misapprehension or mistake as to the boundaries of their lands, with no intention to claim as their own that which did not belong to them, but only intending to claim to the true line wherever that may be, they must find for the plaintiff.

"See *Schaubuch* v. *Dillemuth*, 108 Va. 86, 60 S. E. 745, 15 Ann. Cas. 825."

2. This instruction correctly expounds the law when stated in reference to a case to which it is applicable; indeed, the precise language employed in this instruction may be found used by this court in its discussion of the cases in which the rule that intention to hold adversely is an essential element of adverse possession. The error in this

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instruction, as applicable to a case such as that at bar, is contained most distinctly in the concluding paragraph of it, namely: " * * * and, therefore, if they believe from the evidence that the defendants occupied and possessed the land in controversy through a misapprehension or mistake as to the boundaries of their lands, with no intention to claim as their own that which did not belong to them, but only intending to claim to the true line wherever this may be, then they must find for the plaintiff.

The proposition of law embodied in this paragraph is good and sound in principle only where the case is one where the fact is that no intention to hold adversely up to the boundary line *on the ground* in question exists or is proved. In a case of absence of proof of such intention, possession taken through a misapprehension or mistake as to the boundary of land, with proof only of a general intention to claim only what belongs to one, as may be determined by the true boundary, wherever it may be, the mistake explains the possession and there is an absence of proof of the fact that the intention to claim adversely exists. Similarly, if the possession up to a given boundary is taken under a parol agreement between adjoining land owners that the line is not the true boundary line, there is an absence of an intention to claim adversely on the part of one taking possession under such an agreement. And the cases in which there may be an absence of the intention to claim adversely, *i. e.*, where the possession may be explained as consistent with the absence of such intention, are as various and as innumerable as are the mutations of human affairs. No especial significance, therefore, is to be given to the taking of possession under a mistake as to the true boundary, nor any especial or conclusive presumption is to be inferred as resulting from it. It is merely an explanation of the character of the possession taken under such circumstances, which in the absence of proof of spe-

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cific intention to claim title to a definite line *on the ground,* then or subsequently existing, negatives the idea of the existence of such intention.

On principle this is necessarily true. And to give to the fact that possession once taken, under a mistake as to the true boundary, may not in some cases, at the very time of taking possession under such mistake, be accompanied by the intention to claim title adversely, or if not at such time so accompanied, may not afterwards change its character, on the part of the original possessor, or subsequent possessor claiming under him, would be a confusion of ideas and would be to lose sight of the fact that the inquiry always, in a case of alleged adverse possession, is, with what intent is it in fact held? In other words, was it with claim of title? It is true that if originally taken under a mistake, and with the conditional intention only, above referred to, in the absence of proof of a specific intention as to the extent of the claim of title, or of a later or changed and specific intention, it will be assumed that there has been no change in the intent. What is not proved cannot be assumed to exist. It is also true that as between parties and privies a possession originally taken in subservience to another's title cannot be changed into an adverse possession without proof, not only of a subsequent specific intention to claim adversely, but such proof must go to the extent of bringing home notice of such intention to claim adversely to the owner of the dominant estate, or be of such a character that such notice will be presumed (*Creekmur* v. *Creekmur,* 75 Va. 430, and other cases on this subject). Still, the fact remains that, if in a given case there is proof of such specific intention to claim adversely, and there is no complication arising from the possession having been taken originally by agreement or in subservience to a dominant estate, (or, if there is such complication, the facts are such that notice of the intention to claim adversely is

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brought home to the owner of such estate, or the proof as to it is of such character that such notice will be presumed), from that moment, the possession will be adverse, and the statute of limitations will begin to run, regardless of the prior absence of intent to claim adversely.

On principle no other position can be in accordance with the spirit and intent of the statute of limitations, or indeed with the strict letter of the statute. On authority we find the same to be true.

The leading case in Virginia on the subject of possession taken by mistake is that of *Davis* v. *Owen*, 107 Va. 283, 58 S. E. 581, 13 L. R. A. (N. S.) 728. In that case there was an express disclaimer, on the part of the school trustees who took the possesion relied on by the defendants as adverse, of any intention to claim title beyond the true boundary. The defendants had had only eight or nine years' possession themselves, not sufficient to apply the bar of the statute of limitations. Hence, there was in that case an absence of proof of an intention to claim adversely existing, coupled with possession, for the statutory period, and what is said by this court in that case must be read as applicable only to the case before the court.

This subject of possession taken by mistake is referred to in the case of *Haney* v. *Breeden*, 100 Va. at pp. 783-4, 42 S. E. 916, 917, and it is there made plain that in such cases the real inquiry always is whether the possession was with or without the *intention of claiming title*, this court saying: "It is true adverse possession depends upon the intention with which the possession is taken and held; and while the intention to claim title must be manifest, it need not be expressed. But whether or not the plaintiffs took possession by mistake or without the intention of claiming title is a question for the jury * * *"

In the case of *Schaubuch* v. *Dillemuth*, 108 Va. at pp. 91-2, 60 S. E. 747, 15 Ann. Cas. 825, this court said: "The evidence, considered upon the demurrer to it, mani-

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festly does not sustain the defendant's claim of adversary possession. It does appear that he had exclusive possession of the land in controversy for more than fifteen years, perhaps for twenty-five or thirty years; but it does not appear that he held it under color of title or claim of right. If he held it as the grantor of his father, he held, not adversely, but in subserviency to the grantee, as there is no evidence that he ever disclaimed that relation, and asserted an adverse right, which was brought to the knowledge of his grantee or those claiming under him. If he was holding the land under the mistaken belief that the fence between the thirty-three acres and the land in controversy was the line, the evidence not only fails to show that he intended to *claim* and *hold all the land east of the fence*, whether or not it was upon the true line between his land and that which he had conveyed to his father, but it tends strongly to show that he did not occupy the land with the intention of claiming or holding to the fence unless that was upon the true line. When his attention was called to the fact, by his father's vendee, Mr. Epes (after the latter's agreement to sell his farm, which included the fifty-acre parcel, to the plaintiff, but before the purchase price had been paid and the conveyance made), that the boundary west of the fence only contained thirty-three acres, he did *not claim* that he was the *owner of the land immediately east of the fence.* On the contrary, he stated that he had sold fifty acres to his father and that Mr. Epes was entitled to that much land. He by agreement went upon the land with Mr. Epes, a surveyor named Rives, and the son of the plaintiff who represented her, to establish the line and mark the corners of the fifty-acre parcel. The surveyor, in accordance with the directions of the defendant, ran the line far enough west of the fence to make up the fifty acres called for by the defendant's deed to his father, and marked the corners and line trees

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thereof. The defendant, not being entirely satisfied with the accuracy of that survey, went upon the land again with Mr. Epes and another surveyor, and at that time admitted that the survey made by Mr. Rives was practically correct." (Italics ours.)

In the case of *Clinchfield Coal Co.* v. *Viers,* 111 Va. 261, 68 S. E. 976, the plaintiff, relying on adverse possession, recognized the location of the line in controversy as claimed by the defendant as the true line "by deed of July 23, 1904, in which he unites with others in conveying to the grantee all the coal on a certain tract of land, the boundary lines called for in the deed going exactly to and no further than the" line as claimed by defendant. This was within the statutory period before the institution of the suit. It was not a case, therefore, in which the fact was that there was a specific intention proved to exist on the part of the possessor to claim title to *a definite line on the ground* in fact beyond the true line. What is said by this court, therefore, in that case must be read in the light of the case before the court. (See also *Stuart* v. *Meade,* 119 Va. 753, 89 S. E. 866.)

The cases elsewhere are not in harmony on this subject, but the conflict is more seeming than real. It is believed that the considerations on principle above suggested, and the further consideration that much of the conflict on the subject arises from the different presumptions which the courts entertain at the beginning of their reasoning as arising from the proof only of possession, without express proof of intention to claim title to a definite boundary *as located on the ground,* will go far to harmonize them.

In Virginia, proof of an expressed intention to claim title is not necessary. *Haney* v. *Breeden, supra.*

It is said in *Ross* v. *Gould,* 5 Me. (5 Greenl.) 121: "* * * a disseisin cannot be committed by mistake, because intention * * * is an essential ingredient in a disseisin."

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But this assumes that there is no proof of intention to claim title beyond the boundary line as *designated in the claim of title* of the possessor—the *extrinsic* matter of the calls in the deed or other evidence of claim of title being the *controlling factor* of the intention of the possessor. Coupled with this proof there may or may not be further proof of an actual intention to claim title to *the land itself* up *to a specific boundary line on the ground,* as the *controlling factor* of the intention of the possessor. In the former case the intention to claim title would be contingent and ambulatory, dependent for definiteness of location on the ground upon the more definite ascertainment of precisely where the lines called for in the chain or claim of title should be located on the ground. In the latter case, if such further proof be present, the possessor is shown by such further proof itself to have taken a step further in his mental process and to have decided for himself, then and there, without waiting for any future more definite ascertainment thereof, that the lines called for in his chain of title have in fact a definite *locus* on the ground, which he then and there fixes upon definitely and claims title up thereto. It is true that in taking such definite action he may be mistaken in his location as compared with the true location of the lines called for in his chain or claim of title. It may be true that but for such mistake he would never have taken the further step of forming the definite intention to claim title up to the definite location of the line in question on the ground; but the fact exists that he did form such definite intention. In such case, if he has no other claim of title than his true title, he has no color of title to give him constructive possession beyond the true boundary line. But he may, nevertheless, take and hold possession by *pedis positio* or actual possession beyond his true boundary line, and with such *bona fide,* though mistaken, claim of title to the extent of such *pedis positio* or

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actual possession, he will have adverse possession, which if continued unbroken for the statutory period will ripen into a perfect title under the statute of limitations. (See *Creekmur* v. *Creekmur, supra; Kincheloe* v. *Tracewell,* 11 Gratt. (52 Va.) 587, 685; *Reusens* v. *Lawson,* 91 Va. 236, 21 S. E. 347; *Shanks* v. *Lancaster,* 5 Gratt. (46 Va.) 110, 50 Am. Dec. 108; *Drumright* v. *Hite,* 2 Va. Dec. 465, 26 S. E. 583—as to general subject of the character of claim of title which may support adverse possession in Virginia.) Otherwise the statute of limitations would not run in favor of possession under a *bona fide* claim of title when possession is taken beyond the bounds of the true title, and no honest man could acquire title under such statute. His very honesty and *bona fides* would rob him of the benefit of the statute. As is aid in *Cole* v. *Parker,* 70 Mo. 372: "Honest men always inclose land not their own by mistake, or with the consent of the owner, and if the law on this subject were not as this court has held, the statute of limitations would never run in favor of an honest man, because he would never avow his purpose to have been to take the land of another."

As is said in *French* v. *Pearce,* 8 Conn. 439, 445, 21 Am. Dec. 680, "the intention of the possessor to claim adversely is an esential ingredient * * * yet * * * the person who enters on land believing and claiming it to be his own * * * though under a mistake, * * * does thus enter and possess. The very nature of his act is an assertion of his own title and the denial of the title of others. * * * it is certain that a disseisin may be committed by mistake as that a man may, by mistake, take possession of land, claiming title and believing it to be his own. * * * Adopt the rule that an entry and possession under claim of right, if through a mistake, does not constitute an adverse possession and a new principle is substituted. The inquiry no longer is whether visible possession, with the intent to possess,

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under a claim of right, and to use and enjoy as one's own is a disseisin; but from this plain and easy standard of proof we are to depart, and the invisible motives of the mind are to be explained * * *."

In *Seymour* v. *Carli*, 31 Minn. 81, 84, 16 N. W. 495, 496, after conceding that the parties, when possession was taken, made a mistake as to their boundaries, the court said: "The object of the statute is to quiet titles and end disputes. If the plaintiffs have a cause of action in ejectment, there would seem to be no good reason why the statute should not run against it, as in other cases where the possession of land is withheld. It is the policy of the law that parties should assert their claims to the possession of land and rectify their boundaries within the statutory term."

A collection of many recent cases on this subject will be found in the note of the learned annotator to 33 L. R. A. (N. S.) 923, *et seq.*, where the varying views of the different courts in recent cases will be found. The conclusion of the annotator is that, "the old idea that there could be no disseisin by mistake is now abandoned," and that "the trend of opinion is against disturbing him whose visible boundarises have existed for the period of the statute of limitations."

On the whole, the correct rule, and the rule in Virginia, may be taken to be that, where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line on the ground. That is to say, on the whole proof a case must be presented in which the preponderance of evidence as to the character of the possession, how held, how evidenced on the ground,

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how regarded by the adjoining land owner, etc., etc., supplies the proof that the definite and positive intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line *on the ground* existed, coupled with the requisite possession, for the statutory period, in order to ripen title under the statute. Whether the positive and definite intention to claim *as one's own* the land up to a particular and definite line *on the ground* existed, is the practical test in such cases.

The collateral question whether the possessor would have claimed title, claimed the land as his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas.

The verdict of the jury in the case at bar is an illustration of the effect that results from a confusion of the circumstance that there was a mistake in the original location of the lines in controversy (if there was in fact such a mistake, which would be but a single circumstance after all, which should have been considered by the jury in determining whether the fact of an intention to claim title up to such boundary lines existed in the possessor for the requisite statutory period) with the broader consideration of whether on the whole case the evidence shows that such intention to so claim title existed. That is to say, it seems clear that the jury, under the instruction under consideration, drew from the presumption that arises from such a single circumstance, a conclusive inference that in such a case no intention to claim title to the boundary as located on the ground could at any time exist. This was to base an inference upon a presumption, which this court has held in another line of cases cannot be done. (*C. & O. Ry. Co.* v. *Heath,* 103 Va. 64, 48 S. E. 508.) And under such

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instruction the verdict of the jury ignored the uncontradicted testimony in the case referred to above, which was in effect that defendants had for the greater part of seventy years in fact claimed title, claimed as their own the land, up to the old rail fence and hedgerow location *on the ground* of the lines in controversy with the knowledge thereof on the part of, and hence brought home to, the adjoining owners, under which plaintiff claims, at least up to the time of her acquisition of the title, a claim of title which would have sufficed to apply the bar of the statute of limitations as against such adjoining owners even had the defendants' possession been originally taken in subservience to the title of such owners (*Creekmur* v. *Creekmur, supra,* and kindred cases too numerous to cite). If such could be the law in this State, few titles would be secure from experimental surveys based upon the calls for courses and distances of ancient plats, in disregard of long established boundaries in accordance with actual possession taken and held for the prescriptive period, or longer, without objection on the part of adjoining land owners. It is true that courts have no policies, but they know that the policy of the statutes of limitations is one of repose, and this court would feel that a construction of this statute which would nullify its policy would not be a correct construction of it.

Our conclusion, therefore, is, on the instruction "B" under consideration, that the court below erred in giving it in this case; and that while its language is abstractly correct as applicable to a proper case therefor, it would be a better practice in any case for any instruction or instructions on this subject to be in a different form, so as to present for the consideration of the jury, in dealing with this subject, the main and broad question, whether the intention to claim title—to *claim as his own* the land—up to the line or lines in controversy *on the ground* in fact existed, along with the acts of possession relied on by the

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possessor, and direct their attention to the consideration of mistakes in original location of boundary, if such was made, as but one of the circumstances, if there are others, which bear upon such question of fact as to intention to claim title.

Instruction "C" was as follows: "The court instructs the jury that while the quantity of land mentioned in the deed will not control the boundary when estimated by the description, nevertheless a correspondence of quantity given by a line in question with the quantity mentioned in the deed or in the approximation thereto, may be considered as going to establish such line as the true one."

3. We think that this instruction gave too great prominence and weight to the mere acreage. Instead of instructing the jury that the quantity of land may be considered "as going to establish such line," it would have been better for the court to have said it may be considered "as a circumstance bearing upon the establishment of such line, but one of less weight than natural monuments or corners or reputed boundaries called for in the plat, 'Exhibit X' filed with the plaintiff's petition in this case."

Instruction "D" was as follows: "The court instructs the jury that if they believe, in the light of all of the evidence, that the boundary lines between the parties hereto have been properly determined and laid off by Mr. H. G. Garland, the surveyor appointed by the court to make the survey herein filed, in accordance with the plots and metes and bounds attached to or referred to in deeds and other muniments of title under which said parties claim their respective rights and title to the lands in question as introduced in this case, then the court further instructs the jury that if they believe from the evidence that these lines have by mistake of the parties hereto or their grantors or predecessors in title become confused so that the defendants have in consequence taken possession of a part of the land

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shown by said survey as properly belonging to the plaintiff, then unless the jury believe from the evidence that the defendants or their predecessors in title have intentionally dispossessed the plaintiff or her grantors for the purpose of acquiring title by adversary possession to all or a part of the land in question, then they, the jury, should find for the plaintiff in accordance with the report and survey of Mr. H. G. Garland filed in this suit."

It is deemed sufficient in this case to say—

4. We think that this instruction is erroneous because of its adoption of a wrong view of the effect of a mistake in the original location of boundary lines, as above set forth.

We come now to consider—

d. The refusing of certain instructions numbered 1 to 7 offered by defendants.

1. As this opinion has been sufficiently prolonged, it is deemed sufficient to say on this subject that all of these instructions were properly refused, it appearing from the record that the other instructions given for the defendants fairly submitted their theory of the case to the jury.

We have not reviewed the cases of *Hamman* v. *Miller*, 116 Va. 873, 83 S. E. 382, and *Wright* v. *Rabey*, 117 Va. 884, 86 S. E. 71, because they are not directly in point upon any of the questions involved herein; but the manner in which the statute in question was dealt with in those cases tends to support the conclusions reached in the present case.

For the reasons stated above, we are of opinion to reverse the judgment complained of, set aside the verdict of the jury, and grant a new trial, to be had not in conflict with the views above expressed.

Reversed.

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Richmond.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED v. MURRAY.

November 16, 1916.

Absent, Sims, J.*

1. ACCIDENT—*Proof Required—Circumstantial Evidence—Demurrer to Evidence.*—While the proof of an accident may be circumstantial, the circumstances proved must point directly to the main fact in issue and not be such as to lead merely into a labyrinth of surmises and conjectures. Even upon a demurrer to evidence the finding cannot be based upon conjecture, guess or random judgment, but must be founded upon facts shown in evidence.
2. NEGLIGENCE—*Burden of Proof—One of Two Causes of Accident.*—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other.
3. ACCIDENT INSURANCE—*Accidental Death—Burden of Proof—Presumption—Case at Bar.*—In order to recover on an accident policy, the burden is on the plaintiff to bring himself within the provisions of the contract of insurance by proving an accidental injury to the assured. There is no presumption to aid in this proof, as death is presumed to be the result of natural dissolution rather than of accidental injury. In the case at bar, the accidental death of the assured is not established by the evidence introduced in the cause.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action on an accident insurance policy. Judgment for the plaintiff. Defendant assigns error.

Reversed.

* Submitted before Judge Sims took his seat.

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The opinion states the case.

R. Randolph Hicks, for the plaintiff in error.

E. R. F. Wells, for the defendant in error.

CARDWELL, P., delivered the opinion of the court.

This action was brought by Jenny W. Murray against the General Accident, Fire and Life Assurance Corporation, Limited, to recover the amount claimed to be due on a policy of accident insurance which had been issued to plaintiff's husband, William L. Murray, by the defendant.

The defendant pleaded the general issue—non-assumpsit—to which the plaintiff replied generally; and also filed two special pleas, the substance of which was that the policy sued on was issued to the insured upon the faith and belief that certain statements made by him in a written application therefor and intended as warranties were true, but were by the assured knowingly falsely made, and that but for these false statements in his application for the policy, which were material, the policy sued on would not have been issued; upon which special pleas the plaintiff joined issue.

Evidence was introduced by both parties in support of their respective contentions, and thereupon the defendant demurred to the evidence, in which demurrer the plaintiff joined, and the court overruled the demurrer and entered final judgment in favor of the plaintiff against the defendant for the amount of the policy of insurance sued on, $4,500, with costs, to which judgment this writ of error was allowed.

On March 8, 1914, the assured, William L. Murray, a resident of Norfolk city, Va., was taken sick with a very mild case of smallpox, the case being so mild that the at-

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tending physician experienced considerable difficulty in diagnosing it as smallpox, and it was not until March 14, 1914, that the case was reported as smallpox to the health authorities of the city of Norfolk, on which day the patient was removed from his residence to Craney island, the detention station for smallpox cases, established by and under the authority of the health board of the city of Norfolk; and according to the attending physician, Dr. Sleet, at Craney island, the assured's case of smallpox was so mild that he was not confined to his bed over two or three days, but was up and walking around his room, which testimony is borne out by one Henry F. Barr, another smallpox patient at Craney island, who occupied the same room with the assured. On March 25 or 26, 1914, the Wednesday or Thursday before the assured left Craney island, he having practically recovered from smallpox and had been told by Dr. Sleet that he was going to clear him up and send him home shortly, he put on a pair of new high tan shoes, which he had owned for ten days or two weeks and had worn some before going to Craney island, but had not worn before at the island, and took a walk around the island. Coming back to his room about four or five o'clock that night, he said to his companion, Barr, that "his foot was hurting him by smarting." Nothing further was said about it that night, but the next morning the assured had a high fever, lounged around the room and did not eat any breakfast, and on March 28 or 29 a case of erysipelas developed in his leg. On the night of the 30th of March, he was carried to his home, where he died from the effects of the erysipelas about two weeks later.

It was the contention of the plaintiff at the trial that the death of the assured was the result of a bodily injury caused through accidental means, namely, the rubbing of his foot by his shoe; that through an abrasion of the skin caused in this way, the erysipelas germ entered his body,

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causing the erysipelas, which led to his death; and that death brought about in this way was covered by the policy of insurance on which this action is based.

The defendant, on the other hand, contended that the evidence was not sufficient to show that the assured came to his death by reason of bodily injuries effected through accidental means, and, further, that the policy of insurance was rendered void by reason of an alleged false and fraudulent answer made by the assured in his application for the policy.

The question whether or not the assured's death was the result of "bodily injuries effected directly and independently of all other causes through accidental means," involves two component inquiries, the first of which is, was the erysipelas of which the assured died caused by an accident, namely, the rubbing of his foot by his shoe? In other words, the assured having died, as is not controverted, of erysipelas, how was this erysipelas, the beginning of his death, caused?

We have stated in a general way the facts which the evidence proved, or tended to prove, as to assured's stay at Craney island, the detention station for smallpox cases, his condition at the time he was sent to his home, where he died about two weeks later, etc., and we will now review more in detail the evidence relied on by the plaintiff to sustain her contention that the erysipelas, of which the assured died, was caused by the rubbing of his foot by his shoe. This evidence is given by the witness, Barr, who was, as stated, occupying the same room with the assured at that time, and the plaintiff testifying on her own behalf.

The substance of the testimony given by Barr as to what he saw on the evening it is claimed that assured's foot was rubbed by his shoe, is: "He was walking around the room, and healing rapidly, and was wearing slippers like

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anyone else, and one evening he put on a high pair of tan shoes. He walked around on the island and came back about four or five o'clock, to the best of my recollection, and came back and sat around. They generally retired about seven or eight o'clock, sometimes later, and before retiring he set on the edge of the bed, and he says to me * * * He said that his foot was hurting him by smarting." After stating that he the next night examined assured's foot, witness Barr says: "He had a small rubbed place, just a fraction above his ankle bone, a reddish place. I did not want to discourage him, but it looked to me like erysipelas, but I did not know, but he showed it to the doctor when the doctor came again. The doctor came over in the afternoon and taken his temperature, and it registered 102, and he examined him. He told him he didn't see anything the matter with his lungs or anything, but thought he had * * *" (Here witness was stopped.)

The witness was then asked as to when Dr. Sleet first saw assured's leg after it became infected, and if he remembered what Dr. Sleet did, to which witness replied: "He looked at it and said it was caused by the infection of the shoe." Dr. Sleet was questioned with regard to this, and while he did not deny it, said that he did not remember, but did state positively that he saw "the point of infection," and that it was "between his ankle and heel," not above the ankle bone. The witness Barr had stated that the small rubbed place he saw was "just a fraction above his (assured's) ankle bone, a reddish place."

Plaintiff testified that when the assured went to Craney island he carried with him a pair of tan shoes which he had owned about two weeks or ten days before he left, and that when he came back from Craney island his temperature was 104; that his right limb was swollen up to his knee and the next morning she found a place on the side of his foot the size of the end of her finger which looked

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"rubbed and was crinkled and rough like one's finger would be when in water." Her testimony on this point is as follows:

"Q. Did you have occasion to examine Mr. Murray's foot and leg after he came back from Craney island? A. Not that night. I did the following morning after the doctor came and was dressing it, and the nurse and I found a place on the side of his foot.

"Q. What size place? A. It was the size of the end of the finger and looked rubbed, and was crinkled and rough like your finger would be when in water.

"Q. Which foot? A. The right foot between the heel and the ankle bone on the inside of the foot.

"Q. What kind of shoes did Mr. Murray take with him to Craney island? A. A pair of new tan shoes, that he had about two weeks, the first pair that he had had for several years.

"Q. Had he worn these much before he went to Craney island? A. No, they were new; just two weeks or ten days before he left."

It is to be observed that the witness, Barr, says he saw a place *above* the ankle of the assured which *looked* like it had been rubbed, which was twenty-four hours after the assured's walk in the high shoes, but neither he nor the plaintiff, Mrs. Murray, undertake to say that it was rubbed by the shoe, or how rubbed. Dr. Payne, the attending physician after, as well as before, the return of the assured from Craney island to his home, and who was put on the witness stand by the plaintiff, did not see this rubbed place located by the witness, Barr, above the ankle joint, but by the plaintiff, Mrs. Murray, between the ankle joint and the heel, nor did any other witness see it. But whether the rubbed place—"a reddish place"—which Barr saw and located as "just a fraction above the ankle bone," was the same "rubbed, crinkled and rough looking place like one's

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finger when in water" which Mrs. Murray discovered and says she pointed out to the doctor, and which, according to their recollection was between the heel and the ankle bone, or whether there were two separate and distinct abrasions or reddish places on the assured's ankle, is we think wholly immaterial as the vital question presented at the threshold of the case for determination is whether or not the evidence is sufficient to have warranted a jury in finding that this abrasion or reddish, crinkled looking place was caused by the rubbing of assured's shoe, and through which rubbed, etc., place the erysipelas germ entered his body, thereby causing his death. Barr only says that it *looked* like it had been rubbed, and his statement that it looked to him like erysipelas and that he called Dr. Sleet's attention to it, and that the latter said it was "caused by the infection of the shoe," is wholly without probative force, first, because the statement that it looked to the witness like erysipelas is an unwarranted statement from one not shown to be competent to express an opinion on such a subject; and, second, because there is no evidence whatever in the case to prove or tending to prove that the assured ever had a tight shoe, or that a shoe, tight or otherwise, rubbed his foot. The assured when he complained of his foot hurting by smarting said nothing about his shoe having rubbed his foot. So that if Dr. Sleet ever said that the place pointed out to him by Barr was "caused by the infection of the shoe," it was but an expression of an opinion having no foundation other than conjecture and speculation to support it.

The medical or expert testimony in the case, which is practically not controverted, shows that erysipelas is a disease caused by the entrance of a germ through an abrasion or some break of the skin; that it is necessary for there to be an abrasion or break in the skin in order for this germ to enter, and that the disease is not caused by

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any internal disorders. But it is also in proof that this particular germ frequently enters the body as a sequela of smallpox which consists of numerous small pustules or sores on the body which penetrate the skin. Dr. Sleet, a practicing physician for thirteen years, and who, as city physician of the city of Norfolk, had an experience in two epidemics of smallpox and had treated during this experience some 3,000 cases, testifies in this case that he treated 702 cases of smallpox during the year that the assured, Murray, died, and among this number there were thirty-three cases of erysipelas as a result of the smallpox; and this was not considered by Dr. Sleet a large percentage. He further states that the year before two or three out of seventy-five cases of smallpox developed erysipelas. Dr. Sleet was asked the following questions and gave the following answers thereto:

"Q. Now, doctor, until the (smallpox) sores are entirely healed, there are abrasions in the skin, are there not? A. Yes, sir.

"Q. Through which erysipelas may enter? A. Yes, sir.

"Q. You did not observe any particular point of infection when you first examined Mr. Murray, did you? A. I saw the point of infection, yes, sir.

"Q. Where was it? A. Between his ankle and heel.

"Q. (By the court) You mean by that the germ had gotten in there? A. Between the ankle and the heel; yes, sir.

"Q. When you found—after you discovered Mr. Murray was suffering from erysipelas, had the body been cleared of the smallpox? A. It had not.

"Q. At that time the sores were still there. A. Yes, sir.

"Q. And there were weak places in the skin? A. The scabs had not come off in a good many places when he was taken sick.

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"Q. At the time that he was taken sick, there were open places that would be subject to infection from smallpox? A. I presume so."

Dr. Schenck, the health commissioner of the city of Norfolk, who had charge of the smallpox cases occurring at the time that the assured, Murray, had it, testified as follows:

Q. "What are amongst the *sequelae* of smallpox? A. Abscesses, carbuncles, different kinds of infection, erysipelas and inflammation. The various types of which are recognized by all authorities as being quite apt to follow smallpox. Smallpox is an aseptic disease and exposed to all aseptic."

The witness further testified on cross-examined that according to all the authorities it was necessary that there should be an abrasion, an opening of some kind in the skin, for erysipelas to enter; that even if the germs were to enter through one of the smallpox pustules, there would have to be some sort of rubbing of that part, any opening in the skin, or any part of the cutaneous tissue would govern.

"Q. If a scab had formed over the pustule it would be necessary for the scab to be rubbed off? A. My opinion, I would not think it would enter the ordinary scab over a sore. It would have the scab cover against the infection.

"Q. (By the court) You say the germ could be protected by the scab? A. It could get under it. I don't say the scab entirely seals it.

"Q. There would be an opening in the scab for it to get in? A. There must be; yes, sir."

Upon further cross-examination the witness stated that to some extent the scab on a smallpox pustule acted as a protection; that there would be nothing unusual for a germ to enter a rubbed place on the ankle caused by the rubbing of a shoe, and that he had known of it in his own experience.

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"Q. (By counsel for defendant) What you meant by saying that the scab was not germ proof? A. I don't consider a scab germ proof."

A book written by Dr. Osler, a recognized authority, was introduced by plaintiff, and in it, speaking of smallpox cases, this language appears: "Erysipelas is not common. When it does occur it comes on in the third week of the disease. Considering the number of streptococci which are present in the lesions, and the opportunity of infection, it is surprising that this infection is not more frequent." That learned author also says: "Convalescence should not be considered established until the skin is perfectly smooth and clean, and free from any trace of scabs," which statement coincides with the view testified to by Dr. Sleet in this case, who said: "I don't consider smallpox clean until clear of sores."

Writings by Dr. John MacCombe, of Southeastern Smallpox Hospital, were read from as evidence in the case, and that learned authority says: "Erysipelas is not infrequent; it comes on during the scabbing stage or later, is apt to spread, and is accompanied by fever. When extensive, the constitutional symptoms may be severe, and the patient, if weakened by a severe attack of smallpox may succumb."

Other recognized medical authorities were read from in the introduction of the evidence in the case, all of which bear out the theory that amongst the *sequelae* of smallpox is erysipelas, which is not infrequent, and the patient is not free from danger "until the skin of the patient is perfectly smooth and clean, and free from any trace of scabs," as Dr. Osler expresses it, or as Dr. Sleet states, "clear of sores."

In this case when Murray, the assured, was found to be suffering from erysipelas, his body had not been cleared of the smallpox; there were sores still there, as well as weak places in the skin, and there were open places that

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were subject to infection from the smallpox. So that the crucial question of fact presented in the case was whether the infection of erysipelas, which resulted in the death of the assured, entered his body through the sores incident to smallpox or was caused by an accidental rubbing of his foot by his shoe. In other words, did the fatal erysipelas germ enter the body of the assured at the point which it is claimed was accidentally rubbed by his shoe, or through some abrasion or sore incident to the smallpox? This question is, of course, to be considered and answered in the light of the familiar and oft-repeated rule applicable to a demurrer to the evidence.

The medical evidence given in the case is, as we have seen, uncontroverted, and shows that erysipelas is a disease caused by the entrance of an infection through some break or abrasion of the skin, and further that this particular germ frequently enters the body as a *sequelae* of smallpox, which consists of small pustules or sores on the body penetrating the skin and that these sores when "cleaned off" leave a "reddish" spot in the skin.

The learned counsel for the plaintiff earnestly and forcefully argues—citing numerous authorities to support the contention—that the evidence was sufficient to have warranted the jury in finding that the infection causing the erysipelas in the assuered's leg, resulting in his death, entered through a rubbing or an abrasion caused by his shoe, and therefore this court must so find. Without doubt the proof of an accident may be circumstantial, but the circumstances proved must point directly to the main fact in issue and not be such as to lead merely into a labyrinth of surmises and conjectures. The finding of the jury or of the court cannot be based upon conjecture, guess or random judgment, rather than upon reliable or established facts shown in the evidence.

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It would serve no good purpose to undertake to review the numerous authorities cited as supporting plaintiff's contention in this case. The case is analogous to that class of cases frequently considered and ruled upon by this court, in which damages were sought to be recovered for injuries resulting from an accident alleged to have been caused by the negligence of the defendant, and wherein it has been uniformly held that the burden of showing negligence by a preponderance of the evidence was on the plaintiff, and if the injury might have resulted from one of two causes, for one of which the plaintiff was responsible, but not for the other, the plaintiff could not recover; neither could he recover if it was just as probable that the damage was caused by the one as by the other. *N. & W. Ry. Co.* v. *Poole's Admr.*, 100 Va. 148, 40 S. E. 627; *C. & O. Ry. Co.* v. *Heath*, 103 Va. 64, 48 S. E. 508, and cases cited.

It is true that contracts of insurance are to be construed most strongly against the insurer and in favor of the assured, but, both upon reason and authority, the right to recover upon the policy sued on must be established by a preponderance of the evidence adduced in the case, and not be based merely upon conjecture, guess or random judgment, that is, upon mere supposition without a single known fact.

In order for the plaintiff to recover in this action, the burden is upon her to bring herself within the provisions of the contract of insurance by proving an accidental injury to the assured, and there is no presumption to aid her in this proof, since the well-established rule of law, according to all the authorities, is, that when death occurs it is to be presumed to be the result of natural dissolution rather than of accidental injury.

The proof of the alleged accident in the case of *Carnes* v. *Iowa Travelling Men's Asso.*, 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306, was quite similar in character

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and quantity to the proof in the case at bar, and in the court's opinion in that case it is said: "Now, it is impossible to say, from the evidence, whether Carnes took more morphine tablets than he intended to take, or whether he took just what he did intend, and misjudged their effects. Death might have been occasioned in either way, and one is as likely as the other. Under such circumstances, can it be left to the jury to guess which? The burden of proof was upon the plaintiff to show that death resulted from an accidental cause, and, the evidence leaving this unestablished, she failed to make out a case. It is said, however, that death will be presumed to have resulted from accident, and that the burden of proof is upon the defendant to show the contrary. But an examination of the cases does not sustain this contention. They go no further than to hold that, where the insured has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is on the insurer to establish a defense that the insured was within some exception to the policy * * * The plaintiff wholly failed to prove the cause to have been accidental, and this will not be presumed. It was necessary to do this in order to bring the case within the terms of the policy." See, also, *Kling* v. *Masonic Frat. Asso.*, 104 La. 763, 29 So. 333.

Plaintiff in this case necessarily has to rest her right to a recovery upon the evidence given by herself and her witness, Barr, who occupied with the assured the same room at the Craney island detention station. An analysis of Barr's testimony shows that while the assured, Murray, put on the tan shoes one afternoon and walked out, returning about four or five o'clock, he made no complaint until about bed time, and then only said his foot hurt him by smarting, but Barr does not pretend to say why assured's foot was smarting nor offer any explanation of this remark by the assured. Nor did he examine assured's foot

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at that time, nor until the evening of the day following. and says that he then saw a "small reddish place" above the ankle bone, and concluded that it was rubbed, but does not undertake to say how it was rubbed, and that it was in fact rubbed was necessarily a guess or surmise on his part. When Barr noticed this reddish place above the ankle bone, he showed it to Dr. Sleet, but the latter failed to observe that it was a rubbed place, and at the time that Dr. Payne examined assured, he failed to observe the "crinkled place," testified to by the plaintiff as being between the ankle bone and the heel, so that neither of these physicians who were attending and treating the assured, observed the *phenomena* which were subsequently testified to by plaintiff and Barr. If, therefore, the "crinkly place" observed by plaintiff five days after the assured's infection of erysipelas was a rubbed place, then it was a rubbed place not observed by Barr on the day after the rub is supposed to have taken place, because the only place, a "reddish place," observed by Barr was just above the ankle bone. It is undisputed that the infection of erysipelas did not enter at the point just above the ankle bone noticed by Barr, and which he concluded had been rubbed, but at another place between the ankle bone and the heel; so that the case, in the light of this evidence, even if assured's shoe should have rubbed his foot (which the evidence fails to disclose) shows the erysipelas entered at some other point and could not be considered as having been the direct or even the indirect result of the accidental rubbing of assured's foot by his shoe.

Of the cases cited in support of plaintiff's contention that the evidence in the case is sufficient to have warranted the jury in finding that the rubbing of the foot by his shoe was the cause, independent of all other causes, of assured's death, the case of *Caldwell* v. *Iowa, State, &c. Asso.* 156 Iowa 327, 136 N. W. 678, is, perhaps, more in point here,

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in which case the insured received a slight injury on his cheek, causing a slight abrasion of the skin, which resulted in erysipelas, from whch disease he died, and the defense made to the action to recover the amount of insurance stipulated for in the policy sued on was, that the death of the assured was the result of bodily infirmity and disease, not the result of violent and external injury, and the court held as follows: "Where death results from erysipelas, which follows as a natural, though not as a necessary, consequence of an accidental wound upon the cheek, it may be deemed the proximate result of the wound, and not of the disease, within the requirement of accident insurance policy that death must result solely by accidental means.

"In an action on an accident insurance policy, evidence of the existence of a slight wound upon the cheek was sufficient to support a finding that the wound was violent and external; and that the burden was on the plaintiff to show, not only the death of the insured, but also that it was caused by violent, accidental and external means."

The case here is very different in that there is no evidence, as we view it, to support the theory of the plaintiff, that assured, Murray's, foot had been rubbed by a tight shoe, causing an abrasion of the skin through which the erysipelas germ entered and caused his death. As we have seen, no one testifies in the case that assured ever had a tight shoe, or that a shoe, tight or otherwise, rubbed his foot. Instead of showing that the shoe it is claimed rubbed his foot was the "new high tight shoe" graphically described in the argument of counsel for plaintiff, it is testified by the plaintiff herself that the shoes in question had been owned by assured for two weeks prior to his going to the detention hospital on Craney island, and been worn some by him, and were taken by him to the island when he was sent there. Not only so, but the proof for plaintiff is that when the erysipelas germ entered assured's foot at a point

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below the ankle bone, there were not only red places all over his body, due to smallpox, but pustules or sores of smallpox were still upon his body, through which, it is shown, without contradiction, that the fatal erysipelas germ might have entered.

Juries, as well as courts of law, are called upon to adjudge cases on facts and reasonable inferences from those facts, not upon surmise and conjecture as to what are the facts in a particular case. As we view the evidence in this case, upon the defendant's demurrer thereto, it is wholly insufficient to establish with reasonable certainty the fact, essential to plaintiff's right to recover, namely, that the assured sustained an injury by the rubbing of his foot by a shoe through which the germ of erysipelas entered and caused his death; and, therefore, such a finding by the jury would necessarily have been based solely upon conjecture, guess, or random judgment, rather than upon any reliable or established facts appearing in the case. This view of the case renders it unnecessary to consider other assignments of error.

It follows that we are of opinion that the trial court erred in overruling defendant's demurrer to the evidence, and its judgment will be reversed and judgment entered by this court for the defendant.

Reversed.

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Richmond.

HAMMOND V. RYMAN AND OTHERS.

November 16, 1916.

Absent, Whittle, J.

1. EQUITY PLEADING—*Demurrer—Bill Sufficient on Some Grounds.*—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled.
2. EASEMENTS—*Private Road—When Appurtenant to Land Purchased.*—Where an owner sells a part of a tract of land to another, and at the time of the sale there is a private road leading from the land sold through the lands retained to a public road, and such private road is apparent, continuous and reasonably essential to the use of the purchaser at the time of his purchase and has been so ever since, covering a period of twenty-five years, such purchaser and those claiming under him are entitled to the use of such road as appurtenant to their purchase
3. EASEMENTS—*Private Road—Change of Location.*—Changes in the location of a private road made by the owner of the servient estate and acquiesced in by the parties entitled to the use of the road, are equivalent to changes of the route by agreement, and do not in any way prejudice the rights of the latter.

Appeal from a decree of the Circuit Court of Shenandoah county. Decree for complainants. Defendant appeals.

Affirmed.

The opinion states the case.

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Tavenner & Bauserman, for the appellant.

Walton & Walton, for the appellees.

KELLY, J., delivered the opinion of the court.

This is an appeal from a decree declaring a private right of way and protecting the same against obstruction by a perpetual injunction.

From the very full history, as shown in the record, of the legal title to the lands affected by the right of way, and from the mass of testimony relating to the origin, location and use thereof, the following facts, which we regard as essential and controlling, satisfactorily appear:

Ephraim Hammond, in the year 1888, acquired title to a track of land containing 107 acres, abutting on a public road called the Stoner Mill road. To the north or west of this land, but not touched by it, was another public road known as the Back road. At the time of Hammond's purchase, and for many years prior thereto, there was a road leading from the Stoner Mill road through this 107 acre tract, and thence, through other lands, to the Back road. It appears that there had originally been, and that there were during Hammond's ownership, several roads, or "trails" as he called them, leading out of the 107 acre tract to the Stoner Mill road. The road here referred to, however, was in the main well defined, followed a definite general course, and was much used by the neighborhood as an outlet to the Stoner Mill road. Hammond, for his own convenience and purposes, made certain changes in this route through his place until it assumed the location as existing when this suit was brought. All other outlets from the 107 acre tract to the Stoner Mill road have long since been closed.

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In the year 1891, Hammond sold and conveyed to Franklin Spiker 61 acres of the 107 acre tract. This Spiker land was remote from the Stoner Mill road, but was visibly connected with it by the above mentioned road through the residue of Hammond's land. The deed from Hammond to Spiker did not mention any right of way, and, subsequently, Spiker requested Hammond to give him a writing to evidence the same, and Hammond did give him the following paper, dated February 10, 1892: "I hereby agree to give Frank Spiker privilege of a road to Stoner Mill road where most convenient." There seems to have been no other reason for requesting this paper than that Spiker, whose right to use the outlet had not been questioned by Hammond, was not satisfied with the terms of his deed and felt that he needed an express written assurance from Hammond.

By sundry mesne conveyances, the Spiker land, in 1909, passed to J. M. Ryman, who, like all of his predecessors in title, without question from any source, used the road through the Hammond land as an outlet to the Stoner Mill road, and continued to do so until it was obstructed by Hammond. Thereupon, Ryman and one Robert Bly, who owned a small tract of land (not a part of the 107 acres) adjoining Ryman's 61 acres, brought this suit.

A temporary injunction was granted, the obstruction was removed, and nothing further was done in the cause until about three years later, when Hammond filed his demurrer and answer.

Three grounds of demurrer were assigned. The first two were directed at Robert Bly's connection with the suit as a co-complainant with Ryman. The bill showed that Bly owned a small tract, about 8 acres, adjoining the 61 acres, but failed to show any facts entitling him to use the right of way in question. The demurrer, as to Bly, set up (1) a misjoinder of parties because of a want of privity or

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common interest between Ryman and Bly, and set up also (2) a want of equity on the part of the latter. During the pendency of the suit, Ryman purchased from Bly the 8 acres, and, as the circuit court in its opinion says, "it does not seem necessary to give any further consideration to this claim." If there was a misjoinder, the court, in effect, followed the provisions of section 3258-a of the Code, by disregarding Bly entirely and proceeding solely in the name of Ryman. Conceding, as we do, that the bill failed to show any right to relief on behalf of Bly, it is sufficient to say that no relief was granted to him or to Ryman as his vendee. The decree deals expressly and only with Ryman's 61 acre tract and the right of way therefrom to the Stoner Mill road.

The third ground of demurrer relates solely to the writing, quoted above, given by Hammond to Spiker, and merely calls in question the sufficiency of that writing to create or pass any right which would run with the land. This is not a material issue. It is true that the bill refers to and quotes the writing in connection with a recital of the terms of the deed from Hammond to Spiker, but the gist of the case, as made by the bill, is that the right of way involved passed to Spiker and his successors in title by implication, both as appurtenant to the 61 acres and as a way of necessity. The allegations of the bill were sufficient to support the claim to the way in both aspects, and the demurrer was properly overruled.

Upon the merits of the case, as developed upon the bill and answer and the proof, the circuit court found, first, that Hammond and his predecessors in title did not appear to have any right, as a matter of law, to the outlet used by them through adjoining lands to the Back road, and, therefore, had a right of way by necessity to the Stoner Mill road; and, second, that, even if they did have such right

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of way to the road on the north, that fact would not defeat their right to the way south or east acquired by them as an appurtenance under the purchase from Hammond. Much of the argument on behalf of the appellant is directed at that portion of the circuit court's opinion which recited that Ryman did not appear to have a right of way to the Back road. We do not think this question can affect the result. It might be very material if the decision turned solely upon the doctrine of way by necessity; but, independent of the way leading north to the Back road, we are of opinion, as was the circuit court, that "the right of way through this farm of Hammond's became appurtenant to the land which Spiker bought and adhered to it as completely as if in express language the right had been set out in the deed." The evidence leaves no room to doubt that this way from the 61 acres through the residue of the 107 acre tract to the Stoner Mill road, was apparent, continuous and reasonably essential to the use of the former at the time of Spiker's purchase, and has been so ever since. The case is controlled by the principles announced in *Scott* v. *Moore,* 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749, and *Muse* v. *Gish,* 114 Va. 90, 75 S. E. 764. This court in these cases has discussed those principles at length, with a rather full review of the authorities bearing thereon, and a repetition of that discussion here is unnecessary and would be unprofitable.

The appellant relies upon the case of *Ricks* v. *Scott,* 117 Va. 370, 84 S. E. 676, in which a claim to a right of way was denied, but that case is not at all in conflict with the conclusion reached here. As was said by Judge Cardwell, in delivering the opinion, *Ricks* v. *Scott* upon its facts was wholly dissimilar to the class of cases to which *Scott* v. *Moore* and *Muse* v. *Gish* belong. The instant case belongs to the latter class.

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The changes in the location of the road, which were made by Hammond and for his own convenience, and acquiesced in by the owners of the 61 acre tract, were equivalent to changes of the route by agreement, and did not, in any way, prejudice the rights of the complainant Ryman. Jones on Easements, sec. 352.

There is no error in the decree, and it must be affirmed.

Affirmed.

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Richmond.

JAMISON V. COMMONWEALTH.

November 16, 1916.

1. TAXATION—*Non-Residents—Intangibles—Loans Made Outside of State—Establishment of Business—Acts 1915, p. 163.*—A non-resident who has neither domicile, place of business nor an agent in this State, but who, upon applications to him outside of this State, lends money secured by liens on real estate in this state, and keeps the evidences of debts at his place of residence outside of this State and there receives and collects the principal and interest of such debts, is not conducting a business in this state within the meaning of Acts 1915, p. 163, although he may from time to time come to this state to inspect the lands upon which loans are to be secured, and the bonds, notes, and other evidences of such loans are not taxable in this State under said act. He has not established a business in this State, and has neither a business, domicile nor agent here, and the evidences of debt are not kept here.
2. TAXATION—*How Tax Laws Construed.*—Laws imposing taxes are strictly construed, and whenever there is a doubt as to the meaning or scope of such laws they are construed most strongly against the government and in favor of the citizen.

Error to a judgment of the Circuit Court of Page county, on a motion to correct an erroneous assessment of taxes. Judgment for the defendant. Petitioner assigns error.

Reversed.

The opinion states the case.

R. S. Parks, Leedy & Berry and *D. O. Dechert,* for the plaintiff in error.

Jno. Garland Pollard, Attorney-General, and *Leslie C. Garnett, Assistant Attorney-General,* for the Commonwealth.

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CARDWELL, P., delivered the opinion of the court.

This is an application of plaintiff in error, J. V. Jamison, to the Circuit Court of Page county, made under the statute, to be relieved from the payment of taxes and levies assessed against him on intangible personal property consisting of bonds and notes evidencing loans in the aggregate amount of $36,650, to sundry persons, residents of Page county, and secured by deeds of trust on lands situate in said county.

The application was defended and contested by the Commonwealth, and at the hearing of the cause upon the evidence adduced for and against the relief asked, the court refused to correct the assessment as erroneous and dismissed the application; whereupon Jamison applied for and was allowed this writ of error.

Assessment of the bonds and notes in question was made by the examiner of records for the judicial circuit embracing Page county from the records of the clerk's office of the county, and certified to the commissioner of the revenue for taxation against Jamison, as the owner of the bonds and notes as of February 1, 1915, the assessment being made by virtue of section 9 of the act of March 17, 1915, Acts 1915, p. 163, which, so far as applicable, is as follows:

"The provisions of this section of this schedule shall apply with equal force to any person or corporation representing in this State business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident person or corporation either personally or through an agent shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens, and all bills receivable, obligations or credits and other intangible assets arising from the business done in this State are hereby declared assessable

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within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative."

The schedule referred to in this provision of the statute is schedule "C" of the general tax law ,as amended, and which classifies intangible property—bonds, notes, etc.—intended to be subjected to taxation in this State.

The trial court certifies the evidence in the case, which shows the manner in which the bonds and notes in question were acquired by Jamison and the manner in which he deals with them, and the court's certificate then adds: "The court further certifies that it was clearly proven as a fact at the hearing of said application, and indeed admitted by the applicant, Jamison, that said applicant was regularly engaged in lending money in Page county, as a business conducted for profit, and that the bonds assessed to him by the examiner of records, constituting the assessment here in question, were given for and evidenced loans made by him in the course of such business."

Jamison, as is conceded, was at the hearing of the cause and had been for eighteen years prior, a resident of Hagerstown, in the State of Maryland, but previous to that period of time had been a resident of Luray, Page county, Va. The testimony given by him on his own behalf before the trial court, so far as material to the issue in the cause, is as follows:

"I am the same J. V. Jamison against whom the examiner of records for Page county returned $36,650 worth of bonds, belonging to me, for assessment for the year 1915. All of said bonds are secured by deeds of trust on lands situated in Page county, Va. I have loaned a great deal of money in Page county, and have some cash now that I would be glad to place here should I have a desirable application. I do not have an agency nor an agent in Page county to make loans for me, nor for any other

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purpose. The truth is I am so well acquainted with the lands for ten miles around Luray that I would generally know on application whether the loan would be a desirable one or not; and in such cases as appeared doubtful to me I have come to the county to look the property over myself. Mr. Landram (an attorney) frequently made application to me for parties, and others have done the same thing, for loans. Mr. Keyser (referring to the Commonwealth's attorney present) has for one * * * A great many applications were made direct to me by the parties desiring the money. And some of these loans were desirable and I took them, without consulting anybody, as I knew the applicants personally and the property offered by them as security. If I had doubt about the title I would have Mr. Landram to examine the title for me; but he never was my agent and I never paid him a dollar as compensation, nor did he ever collect any money for me, either principal or interest, both of which were always paid direct to me by the parties owing it or through the Page Valley National Bank of Luray. The deeds of trust securing these bonds, the bonds themselves, and the insurance policies were always sent to me at the time the loan was made; they would be sent to me and I would send my check for the amount of the loan. I kept them in my deposit vault in Hagerstown and have never had any bonds or notes or moneys deposited with any person or institution in Virginia since I moved from the State. The laws of Maryland require me to render these bonds for assessment; they were so rendered, and I pay a tax on them in the State of Maryland. It is true that Mr. Charles S. Landram appears as trustee in practically every trust wherein I am secured the payment of money in this county. This is true because he has made more applications to me for money for different persons than anyone else. He was getting the money, negotiating the loans for these respec-

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tive persons, and preparing the papers, and would, of course, make himself trustee in the deeds of trust. I was treating him just as I would any other broker. Just like I would go to Baltimore and buy a bond from Baker, Watts & Co., brokers. Mr. Landram would have an application for a loan. He would write me, say, that he had a $5,000 bond of which so and so was the maker, secured on certain property, and ask me whether I wanted the bond. I would know the party upon the mere mention of his name, because I have known practically everybody in Page county, and am familiar with the properties in Page county. If it looked good to me I would take the bond, otherwise I would not. Mr. Landram is no more my agent than Col. Leedy, or Mr. Berry, or Mr. Keyser, the Commonwealth's attorney there, or any other person. * * * I never had any one in Virginia, or elsewhere, authorized to make loans or investments for me. It has always been my rule to see to these matters for myself. As I have stated, I always collect both the principal and interest myself, or have it paid to me through the Page Valley National Bank, of Luray, and the bank immediately remits to me. I never left any money in Virginia, with anybody or any institution, for reinvestment, either principal or interest."

Upon being shown certain deed books in which two deeds of trust appeared to be marked satisfied on the margin by "C. S. Landram, agent for J. V. Jamison,' the attorney for the Commonwealth asked the witness, Jamison, to explain the use of the term "agent" as it there appeared, and in answer to which Jamison said: "I do not know by what authority Mr. Landram used the term agent, but the fact is that upon receiving payment of several bonds I remember, after having cancelled them, I have sent them to Mr. Landram with a letter requesting him to take them to the clerk's office and enter satisfaction on the margin

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of the records for me. This may have occurred frequently and you may find more instances of it. But in most cases the releases have been made by the Page Valley National Bank, to whom I would send the bonds for collection and remittance."

C. S. Landram, to whom Jamison referred in his testimony, was examined as a witness for the latter, and the substance of his testimony is that he was not the agent for Jamison and had never been; that he (witness) dealt in and sold a great many mortgage loans, many of which he sold to Jamison; that when he had an application for a loan that he thought would be acceptable to Jamison, he would write and give him the name of the applicant, the terms of the loan and the property offered as security; that sometimes these applications were accepted by Jamison and he would advise witness that he would purchase or take the loan described, in which case the deed of trust would be prepared by witness in Jamison's name and all papers forwarded to him, upon receipt of which Jamison would send witness his check to cover the loan; that in some cases Jamison would not advise witness definitely whether he would purchase the loan until he (Jamison) could come to Page county for the purpose of inspecting the property offered as security * * *; that Jamison had often refused to purcahse loans offered him by witness and that he (witness) was the trustee in all loans that he negotiated and that he had negotiated a large number of real estate loans, with quite a number of different purchasers and did not remember ever having collected either any principal or interest for Jamison except in one or two cases in which he increased or renewed old loans, in which case Jamison assigned the bonds to witness and they were merged in the new loan, after which they were released on the margin of the deed

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book by witness and in such cases witness designated himself either the assignée or agent of Jamison.

With respect to the marginal releases which were made by witness in the deed books shown to Jamison, he stated that in these cases the notes were paid direct to Jamison by the borrower and that Jamison sent witness the cancelled notes, requesting that he make the release for him. Witness further stated that in these cases he designated himself the agent of Jamison for the purposes of these releases, thereby conforming to the language of the statute authorizing marginal releases and further, "I have never retained in my hands, for any purposes, any notes or bonds or other papers connected with Mr. Jamison's loans, nor have I ever had in my hands any moneys belonging to Mr. Jamison to be used in making loans or for any other purpose. "I often have aplications for loans and agree to make them, when at the time I do not know with whom I will negotiate the loan; but they are subsequently sold by me to any one who is willing to buy them."

G. T. Chapman, a resident and merchant of Luray, Va., testified: "I am the G. T. Chapman who was the maker of the deed of trust recorded in the deed book shown Mr. Jamison, and which was released on the margin by Chas. S. Landram, agent for J. V. Jamison. I paid this bond by a remittance direct to Mr. Jamison in Hagerstown. He sent me the cancelled bonds, and subsequently wrote Mr. Landram requesting him to go to the clerk's office and make the marginal release there. I remitted my interest on this loan direct to Mr. Jamison in Hagerstown by my personal check. The last bond covered by this trust, but not the one released by Mr. Landram, I paid through the Page Valley National Bank, and the bank made the release on the margin of the record."

The Commonwealth introduced no testimony to controvert that given by Jamison and his witnesses, Landram and

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Chapman, the only testimony from the Commonwealth being that given by the examiner of records, his deputy and the commissioner of the revenue for Page county, as to how this assessment here in question was made up—that is, from the records in the clerk's office of Page county.

As we read the evidence quoted above, and which the circuit court certifies as being all the evidence adduced in the case by either party, it proves (1) that the bonds or notes in question, assessed for taxation against Jamison in the county of Page, Virginia, were not in the State; (2) that Jamison had no agent in this State for any purpose—not even for the purpose of collecting the bonds or notes when due and remitting the proceeds; and (3) that these bonds or notes, since they were purchased or taken up as loans by Jamison, have been at all times in his possession at his place of residence in the State of Maryland, where they have been regularly "rendered"—that is, listed and returned—for taxation, and the tax thereon paid.

It is conceded on the part of the Commonwealth that this State has no jurisdiction over the person of Jamison, a resident of Maryland, and that "the case resolves itself into whether or not the bonds or notes, evidences of credit in the hands of a non-resident, arising from the non-resident's regularly engaging in the business of lending money in Virginia, had a *situs* for taxation in this State where the business from which they arise is conducted, with or without the intervention of an agent." In other words, that "we are not dealing with a single credit or a series of separate credits, but with a business."

We do not gather from the evidence in the case that Jamison was regularly engaged in lending money in Page county, Virginia, "as a business conducted for a profit" within the meaning and intent of the provisions of the statute, *supra*. Certainly it cannot be arbitrarily said

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that because Jamison had made many loans in Page county, and had more money that he would like to invest in that county in bonds or notes secured by trust deed, the evidences of the loans which are the subject of this controversy are assessable for taxation in Page county by reason of the debtors having their residence in the county, or because the land which is security for the bonds or notes is situated in Page county, since the statute instead of so providing, expressly stipulates that such bonds or notes are assessable, if at all, at the business domicile of such non-resident in this State. It seems clear to us from the reading of the statute as a whole that, so far as applicable to this case, its meaning is that where a non-resident, person or corporation, comes into Virginia and establishes a place of business to buy bonds or notes, and thus loan money and thereby have obligations due him arising from that business, he is to be taxed upon such obligations, just as a citizen of Virginia engaged in a like business is taxed; the tax thereon to be assessed at the business domicile of such non-resident person or corporation, his or its agent or representative. The act itself declares its intent to be that "no non-resident person or corporation, either personally or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens," etc. We take it for granted that it would not be contended that, if a non-resident were to come into a broker's office or elsewhere in this State and invest his money in a chose in action of any character as a loan, and do this repeatedly, he was engaged in business in the city or county where he made the investment or investments, within the meaning of the statute here under consideration. The evidence in this case shows no more than that Jamison acquired the bonds or notes in question in a precisely analogous manner; he simply purchased these bonds or notes of residents of Virginia, se-

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cured on lands in Virginia, and maintained no business domicile in Virginia, conducted either by himself or an agent.

The learned Attorney General cites a number of cases decided in the Supreme Court of the United States as supporting the contention that the test of the right of the State to tax these evidences of credit is not the presence in the State of the evidences of credit, not the jurisdiction over the person of the owner, nor the intervention of an agent, but the localization of the business from which they arise. An examination of these cases shows that the power of the State of origin of the credits to assess the same for taxation was upheld because *transactions in connection therewith were conducted within the State by agents of the creditor on the latter's behalf.* So, in the recent case decided by this court of the *Commonwealth* v. *United Cigarette Machine Co.*, 119 Va., 447, 89 S. E. 935, the power of the State to impose and collect the tax there in question upon the intangible property of the foreign corporation, consisting of "notes and bonds," accounts and money, was upheld upon the ground that the evidences of these credits were all lodged and kept in the company's offices at Durmid, Campbell county, Va., and adhered to the company's office at that place, and their actual situs had always been there. In other words, the authorities, some of which are cited, pro and con, in the instant case, are reviewed in the case just cited, and the tax in question there was upheld upon the ground that the facts in the case brought it under the recognized exception to the rule that intangible property is taxable at the owner's domicile—that is, where a corporation or person residing in one State has an agent in another, who conducts the business of his principal, and has notes, or other evidences of credit in his hands for collection or renewal, with the view of keeping up a permanent business—then the actual situs of the evidences of

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credit would be the place of taxation. That is not the case now under review. Here it does not appear that any part of the transactions constituting a negotiation of the evidences of credit assessed for taxation against Jamison, of which he complains, were conducted within the State either by him in person or by an agent on his behalf. As observed, Jamison never came to the county of Page in connection with these loans, or any of them, except in cases in which either the borrower or the latter's agent had applied to Jamison in Maryland for a loan and he being uncertain as to the value of the security offered came to the county of Page to look over the property for himself.

Landram, in no single instance, according to the evidence, acted as the agent for Jamison in the negotiation of a loan. On the contrary he is shown to have acted in such instances as agent of the proposed borrower in soliciting for him the loan from Jamison. That he may have, at Jamison's request, examined some of the titles to real estate security offered, or that, upon the payment of the loan, he, acting under specific authority for that purpose, relased the lien, falls far short, as it appears to us, of constituting him the agent for Jamison in the conduct of a localized business, such as is essential to uphold the tax in question.

Not only so, and aside from the question of the power of the State to impose the tax, irrespective of the business upon which alone, as we have seen, the tax is sought to be upheld, the State has not, as we view the statute, attempted to impose such tax. The statute, *supra*, reads: "The provisions of this section of this schedule shall apply with equal force *to any person* or corporation, *representing in this State* business interests that may claim a domicile elsewhere, the intent and purpose being that no non-resident person or corporation, either *personally* or *through an agent*, shall *transact business here without* paying to the State a corresponding tax with that exacted of its own citizens,

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and all bills receivable * * * arising from the business in this State are hereby assessable within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative." (Italics ours.) Clearly the statute contemplates the establishing in this State of a "business" and in the case of an individual, as in this case, personally conducted by him or through an agent domiciled in the State. Manifestly the tax is not sought to be imposed as one upon the business, but upon the person representing in this State the foreign interests whose business is "here" conducted by such person; that is, where the business is conducted "here" by the non-resident, either in person or by an agent, and when he or his agent has acquired a domicile here, the tax is imposed. If this were not true, a non-resident who had made a single loan in this State, evidenced by a note or bond, secured by deed of trust on land or otherwise, would be liable to be taxed on the evidence of the loan or credit, although the lender of the money took the evidence of the credit to his domicile in another State and paid taxes on it there. It cannot be maintained that the Page Valley National Bank should be treated as the agent of Jamison "in the conduct of the business," sought to be taxed, for the record only shows that certain of the debtors in loans made by Jamison in Page county deposited to the credit of Jamison in that bank the amounts due him and that the bank merely remitted the same to Jamison, so that if the bank was the agent of any person, it was the agent of the debtor and not of Jamison. In *Pendleton* v. *Commonwealth,* 110 Va. 229, 65 S. E. 536, it was held that a non-resident's deposit in bank creates the relation of debtor and creditor between the bank and the depositor, and is not taxable against the latter, a non-resident of this State.

In any view to be taken of the instant case, it is not sufficiently clear that the purpose and intent of the statute in-

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voked to warrant the assessment of the tax in question is to impose such a tax, and hence there is, at least, doubt that such was the intent and purpose of the statute, in which event the doubt is to be absolved in favor of Jamison against whom the tax is assessed.

"Laws imposing a license or a tax are strictly construed and whenever there is doubt as to the meaning or scope of such laws they are construed more strongly against the government and in favor of the citizen." *Brown* v. *Commonwealth,* 98 Va. 366, 36 S. E. 485; *Supervisors* v. *Talbott,* 96 Va. 723, 32 S. E. 479.

For the foregoing reasons, we are of opinion that the circuit court erred in denying to Jamison, appellant here, the relief sought by him in this proceeding and its judgment will be reversed and this court will enter the order which the circuit court should have entered, relieving Jamison, the appellant, from the payment of the taxes assessed against him, of which he complains.

Reversed.

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Richmond.

MILLBORO LUMBER CO., INC. v. DONALD.

November 16, 1916.

1. PLEADING—*Declaration—Sufficiency.*—A declaration in an action of a servant against his master which sets forth sufficient facts to show the relation between the plaintiff and the defendant, the legal duty owing from one to the other, the breach of that duty by the defendant, and the damages resulting therefrom to the plaintiff, is good on demurrer.
2. MASTER AND SERVANT—*Vice-Principal—Negligence.*—A servant who is charged with the duty of supplying and maintaining suitable instrumentalities with which other servants are to work, and of performing the non-assignable duties of the master, is a vice-principal, and the master is liable for damages proximately resulting from his negligent performance of the duties devolved upon him.
3. MASTER AND SERVANT—*Obedience of Servant.*—The promise of the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law, and he must obey unless the act be one obviously attended by such danger that a man of common prudence would not undertake it.
4. VERDICTS—*Conflicting Evidence.*—The verdict of the jury is conclusive upon a question of fact submitted to them upon conflicting evidence.

Error to a judgment of the Circuit Court of Bath county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

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George A. Revercomb and *H. H. Byrd,* for the plaintiff in error.

Curry & Curry and *Timberlake & Nelson,* for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The plaintiff, T. G. Donald, brought this action to recover of the defendant lumber company damages for personal injuries alleged to have been suffered in consequence of its negligence.

Viewed, as this case must be in this court, from the standpoint of a demurrer to the evidence, it appears that the Millboro Lumber Company, Inc., was, when plaintiff was employed, building a large band saw-mill, with all necessary modern equipments and appurtenances; that R. E. McCamey, a mill builder of large experience in the construction of such plants, was in charge of the work, employing the necessary labor and generally superintending and directing such labor in their work. On the 1st day of May, 1914, McCamey employed the plaintiff, Donald, a young man about twenty-five years of age, who had lived all of his life on a farm and was wholly without experience in the work upon which he was then entering. At the time of the injuries complained of, McCamey was engaged in the construction of a slab conveyor, which ran from the saw-mill to the furnace, a distance of 150 to 200 yards. This slab conveyor increased in height from the mill to the furnace, where it was thirty-five feet from the ground, and consisted of a succession of trestle frames or bents about eleven feet apart, with planks nailed on top. These bents were made on the ground and raised to the desired position by a block and tackle, and steadied by a guy rope which was fastened to a snubbing post on the ground.

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About three days before the accident, which occurred May 16, 1914, the plaintiff was put to work with those engaged in the erection of this slab conveyor, which was completed with the exception of two bents. A bent had been raised at the furnace and secured in its place, leaving a space for the last two bents. On account of the height and the narrowness of the space left in which to work three blocks and tackles were used in completing these last two bents. This operation created a stretch of three ropes, each an inch in diameter, lying close together across the intervening space between the last bent on the mill side and the bent on the furnace end of the trestle, a distance of twenty-four feet. These two trestles had been gotten into position, and it became necessary to put the boards on and nail them down. The plaintiff and a fellow workman were on top of the bent next to the furnace and Huffman was on the last bent coming from the mill. McCamey, the foreman in charge of the work, was on the ground superintending the fastening and attaching of the block and tackle hooks below. The plaintiff says that he had nothing to do with fastening any of these ropes or with handling the tackle or attachments; that his duty was, when a bent had been raised, to shove a board across and nail it to keep the trestle from falling. There being no other boards on the side next to the furnace where the plaintiff was located, McCamey called to the plaintiff and directed him to go across and help Huffman to put on a large board which he could not handle by himself. The plaintiff could have gotten to where Huffman was by going back to the furnace down a ladder to the ground and over the intervening space to another ladder which led up to the top of the slab conveyor on the side where Huffman was, in all a considerable distance. This he started to do when McCamey again called to him and directed him to go across the ropes. The plaintiff asked McCamey if that was safe, and he replied

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that it was, to go on across. These three large ropes, lying close together, were perfectly tight and apparently secure. This method of crossing was accomplished by sitting astride the ropes, and as expressed in the record, "cooning" across. The plaintiff, believing from appearances that it was safe, and relying upon the assurance of McCamey that it was, proceeded to obey the order that had been given him. As soon as he straddled the ropes and sat down, they immediately came loose and he fell to the ground, a distance of thirty feet or more, and received the severe injuries for which he is now asking compensation.

It is clear from the evidence that the accident happened in consequence of defective fastening of the ropes, and it is also quite clear that it was the inadequate fastening of the controlling rope on the ground, which was under McCamey's immediate supervision and direction, which slackened and caused the rope above to come unhooked. The rope above could not have come unhooked unless the controlling rope on the ground was loosened or slackened. The details as to how the ropes came loose are, however, immaterial. It was the duty of the master to furnish the plaintiff with reasonably safe appliances with which to perform the duty he was ordered to perform. It was the alleged neglect of this duty that caused the injuries sustained by the plaintiff.

Upon the trial of this case there was a direct conflict of evidence upon most of the material points. This conflict was determined by the verdict of the jury for $2,500 in favor of the plaintiff, upon which the judgment was entered that we are now asked to review.

We are of opinion that the demurrer to the declaration was properly overruled. It shows the relation between the plaintiff and the defendant, the legal duty owing from the one to the other, the breach of that duty by the defendant and the damage resulting to the plaintiff from such breach.

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No more was necessary. *Hortenstein* v. *Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996.

The defendant company assigns as error the action of the court in refusing to give the ninth instruction asked for by it, which tells the jury, "that if they believe from the evidence that the plaintiff and R. E. McCamey were both in the service of the Millboro Lumber Company, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, that then the said R. E. McCamey and the plaintiff are fellow servants and take the risk of each other's negligence, and if the plaintiff was injured by the negligence or carelessness of R. E. McCamey, then the plaintiff cannot recover and the jury should find a verdict in favor of the defendant."

There is no conflict in the evidence upon the question involved in this instruction. The defendant did not introduce a word of evidence tending to show that the plaintiff was a fellow servant of R. E. McCamey. On the contrary, the trial proceeded upon the theory that R. E. McCamey was in full charge of the work, performing the nonassignable duties of the master. All the evidence in the case bearing on the subject shows that McCamey was the agent and representative of the company, and that his act of negligence in failing to supply and maintain suitable instrumentalities for the work required of the plaintiff by him, was a breach of duty for which the master was liable.

The defendant's third instruction, which was given, is as follows: "The court further instructs the jury that the plaintiff, T. G. Donald, must prove by a preponderance of the evidence that R. E. McCamey, who was in charge of the work of constructing the slab conveyor, directed or ordered the plaintiff to cross from one of the trestles or bents to the other on the tackle rope, and that unless the

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plaintiff proves this fact by a preponderance of the evidence the jury should find a verdict in favor of the defendant company." This instruction admits that McCamey was in charge of the work, and in effect tells the jury that if the plaintiff showed by a preponderance of the evidence that McCamey ordered the plaintiff to cross over on the ropes, the company was liable. This would not have been the case if McCamey had merely been a fellow servant of the plaintiff.

Instruction No. 9, which was refused, was in conflict with instruction No. 3, given at the request of the defendant, and under the facts shown of record the defendant could not have been prejudiced by its refusal.

Objection is taken by the defendant company to the action of the court in giving, over its protest, instruction No. 2 asked for by the plaintiff, which is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff was a servant of the defendant company and that he was ordered by a representative of the company in authority over him to go from where he was on a 'bent' or trestle section to another 'bent' or trestle section on the three block and tackle ropes connecting said 'bents' or trestle sections, then it was the duty of the plaintiff to obey such order unless the act was one obviously attended by such danger that a man of common prudence would not have undertaken it."

There is no error in this instruction. It is based on the evidence and sustained by abundant authority. It is a necessary and primary element in every contract of service that the servant will obey the commands of his master. The promise of the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law, and he must obey unless the act be one obviously attended by such danger that a man of common prudence would not undertake it. 1 Labatt M. & S. (2nd

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ed.) 273; *N. & W. Ry. Co.* v. *Ward*, 90 Va. 687; 19 S. E. 849, 24 L. R. A. 717, 44 Am. St. Rep. 945; *N. & W. Ry. Co.* v. *Ampey*, 93 Va. 108, 25 S. E. 226, *Black* v. *Portland Cement Co.*, 106 Va. 121, 55 S. E. 587.

"The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the negligence of the master, it is but meet that he should be recompensed." *Patterson* v. *Pittsburg &c. R. Co.* 76 Pa. 389, 18 Am. Rep. 412. Labatt M. & S., sec. 440.

The defendant insists that "cooning" across the ropes from one trestle to another was an act so obviously dangerous that no prudent man would have attempted it. The record does not sustain this view. To say the least of it, the evidence on the subject was conflicting and the defendant, by its instruction No. 5, which was given, submitted the question to the jury, and their verdict in favor of the plaintiff is the end of that controversy.

We are of opinion that the case was fully and fairly submitted to the jury, upon evidence amply sufficient to sustain their conclusion, and that upon well settled principles their verdict cannot be disturbed. The judgment complained of must, therefore, be affirmed.

Affirmed.

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Richmond.

SOUTHERN RAILWAY CO. v. BURFORD.

November 16, 1916.

Absent, Whittle, J.

1. MASTER AND SERVANT—*Simple Tools—Inspection—Repairs.*—The master is under no obligation to his servant to inspect, during their use, those common tools and appliances with which every one is conversant, nor to repair defects arising in the daily use of such appliances.
2. MASTER AND SERVANT—*Assumption of Risk—Obvious Dangers.*—A servant assumes the risk of open and obvious dangers of which he has knowledge, or where his opportunity for knowledge is so complete as to leave no room for doubt that he either knew or ought to have known all about them.

Error to a judgment of the Circuit Court of Amherst county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Coleman, Easley & Coleman and *Robert B. Tunstall,* for the plaintiff in error.

Wm. Kinckle Allen, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by John Burford against the Southern Railway Company to recover damages for personal injuries alleged to have been caused by the negligence

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of the defendant company. There was a demurrer to the evidence, which was overruled by the lower court and judgment given in favor of the plaintiff for $1,000, the damages assessed by the jury in the event the court should consider the plaintiff entitled to recover. This judgment is brought under review by the present writ of error.

The salient facts of the case are very few and simple. It appears that the plaintiff was one of three section hands who were engaged in cutting in two a steel rail with a cold chisel. One of the plaintiff's coemployees was holding the chisel by the handle and the other was striking the chisel with a sledge hammer, while the plaintiff, a few feet from these two, was holding the rail and turning it when told to do so. The head of the chisel, from constant blows, was battered, with little frazzles sticking off the edge. In the progress of this operation a sliver of steel penetrated the plaintiff's eye and put it out. It is not shown with absolute certainty where the particle of steel came from; the only reasonable inference from the evidence is that it came from the head of the chisel. In our view of this case, however, it is immaterial whether the sliver of steel came from the head of the chisel or, as suggested, from the rail that was being cut and in consequence of the defective condition of the blade of the chisel. The same result would follow in either event.

These men were engaged in a very ordinary and simple operation, with simple tools, that required, in the use, no experience or skill. The part taken by the plaintiff in the work was so simple that any child with sufficient strength could have held the rail and turned it when told. The battered condition of the head of the chisel was open and obvious. It was a condition that resulted from its use and was necessarily better known to those who used it than to the master. It is well settled that the employer is under no obligation to his servants to inspect, during their use, those common tools and appliances with which every one is con-

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versant; and that it is not the master's duty to repair defects arising in the daily use of such appliances.

In *C. & O. Ry. Co.* v. *Sparrow*, 98 Va. 630, 37 S. E. 302, this court, quoting with approval from an Indiana case, says: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used and no materials are furnished, the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer, who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tool employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, cannot be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured.

"In such case, it does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully understood that the spade, the axe, the hoe, or the ladder, the instrument which he used, was not perfect, and if he was thereby injured, it was by reason of his own fault and negligence. The fact that he notified the master of the defect and asked for another implement, and the master promised to furnish it, in such a case, does not render the master responsible if an accident occurred. A rule imposing a liability under such circumstances would be far-reaching in its consequences, and would extend the rule of *respondeat superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employees engaged in work where machinery and materials are used

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of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar."

This court further proceeding says: "The limitation of the application of the general rule, as applied in those cases, is consonant with common sense, reason and justice, and is not in conflict with any case decided by this court."

In *Southern Railway Co.* v. *Snow*, 117 Va. 627, 85 S. E. 488, it is said: "The general rule is that an employer is charged with the duty of making such reasonable inspection as may be necessary to discover defects; but it is well settled that a master is under no obligation to his servants to inspect during their use those common tools and appliances with which everyone is conversant, nor is it the master's duty to repair defects arising in the daily use of those simple appliances."

The just and reasonable rule announced by these two decisions, known as the simple tool doctrine, is established by the weight of American authority. *Martin* v. *Highland Park Mfg. Co.* 28 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; *Wachsmuth* v. *Shaw Electric Co.* 118 Mich. 275, 76 N. W. 497; *Herricks* v. *Chicago R. Co.* 257 Ill. 264, 100 N. E. 897; *American Car Co.* v. *Fess*, 53 Ind. App. 136, 101 N. E. 318; *Golden* v. *Ellis*, 104 Me. 177, 71 Atl. 649; *O'Hara* v. *Brown Hoisting Machine Co.*, 96 C. C. A. 350, 171 Fed. 394; *Koschman* v. *Ash*, 98 Minn. 312, 116 Am. St. Rep 373, 108 N. W. 514; 26 Cyc. 1136-7-8; and many others that might be cited. These cases clearly show how well established is the doctrine here invoked.

The plaintiff says that he did not see the chisel that was being used to cut the rail, and, therefore, did not know its condition. In view of the positions of these three men at the time of the accident, this statement is scarcely credible. It is, however, immaterial whether he saw it or not; there is no question that he could have seen it by a mere glance

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if he had looked. Having the opportunity to see and know, he assumed the risk of those dangers incident to his employment which were open and obvious, and cannot excuse himself by failure to look and to see. The plaintiff had, to say the least, equal means with the master of knowing the condition of the chisel, and that condition could have been discovered without special skill or knowledge.

In *Clinchfield Coal Corporation* v. *Cruise*, 117 Va. 645, 80 S. E. 135, it is said: "Whether an employee has assumed the risk of dangers incident to his employment may be and often is a question for the jury, but not where, as here, the alleged causes of the dangers are so open and obvious and the knowledge, or *opportunity for knowledge*, on the part of the employee so complete as to leave no doubt that he knew or ought to have known all about them. In such a case the assumption of the risk, as a question of law, bars recovery and is not a question for the jury."

In the light of reason and the authorities cited, we are of opinion that the defendant company is under no liability to the plaintiff for the injury sustained by him growing out of the accident mentioned herein. The judgment complained of must, therefore, be reversed, and this court will enter such judgment as the circuit court ought to have entered, sustaining the demurrer to the evidence and dismissing the plaintiff's case with costs.

Reversed.

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Richmond.

TOMPKINS, ADMINISTRATOR v. POFF.

November 16, 1916.

1. EXECUTORS AND ADMINISTRATORS—*Who to be Appointed Administrator—Distributees—Code, Sections 2637 and 2639—Designees.*—Sons of a testator, although devisees and legatees under his will, would have been his distributees had the testator died intestate, hence by the terms of sections 2637 and 2639 of the Code are entitled to apply for administration with the will of the father annexed—no executor having been named in the will—and consequently may "at any time waive their right in favor of any other person."
2. EXECUTORS AND ADMINISTRATORS—*Appointment—Code, Sections 2637 and 2639—Designation by Distributees—Removal Only for Cause.*—Reading sections 2637 and 2639 of the Code together it is clear that a distributee who applies for administration and is appointed and qualifies can only be removed *for cause;* and the same principle applies to an appointee in whose favor a distributee waives his right to qualify. By substitution such person is clothed with all the rights of the distributee and occupies the same plane. When, therefore, the appointment either of a distributee or of some other person designated by him, has been made and the appointee has qualified, the power of the court or clerk is exhausted, and no further appointment can be made until a vacancy occurs in the office in some way recognized by law. This construction is not an undue discrimination between distributees of the same class, but simply recognizes the priority of application among the class of eligibles.
3. EXECUTORS AND ADMINISTRATORS—*Appointment of Distributee or Designee—Creditors or Other Person—Removal—Code, Section 2640.*—Section 2639 of the Code recognizes two classes of persons as eligible to appointment as administrators: (1) distributees or their designees, and (2) creditors or any other person *after the expiration of thirty days from the death of the intestate.* The provision of section 2640 which allows a dis-

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tributee, upon mere notice, to displace "a creditor or other person than a distributee" applies only to persons of the second class above mentioned, and not to a distributee or his designee.

Error to a judgment of the Circuit Court of Montgomery county on an application to remove an administrator. Judgment for the applicant. Defendant assigns error.

Reversed.

The opinion states the case.

Samuel A. Anderson and *W. B. Kegley,* for the plaintiff in error.

Harless & Colhoun and *Hall, Woods & Coxe,* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The object of this writ of error is to obtain a reversal of the order of the Circuit Court of Montgomery county vacating the office of plaintiff in error, M. H. Tompkins, as administrator with the will annexed of J. W. Poff, deceased, and appointing Lewis Poff administrator in his stead.

The material facts are these: On June 7, 1915, J. W. Poff died testate as to part of his estate and intestate as to the residue, but he named no executor of the will. Three days after his death the will was admitted to probate by the clerk of the circuit court of the county, who, at the same time, on motion of John H. Poff, Roy A. Poff, James C. Poff and Christie H. Poff, four of the sons of the deceased, appointed plaintiff in error administrator with the will annexed. The clerk also designated appraisers who appraised the personal estate of J. W. Poff, which was taken charge of by the administrator.

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Decedent was survived by his widow, Nancy Poff, and the following children and grandchildren, viz: the four sons mentioned above and William H. Poff, A. E. Poff and Lewis Poff, sons, and Pauline Nolly and Ella P. Pritchitt, daughters; also three infant children of Nora Dixon, a deceased daughter. Shortly after the qualification of the administrator the three last named sons gave notice that on June 19, 1915, they would proceed by motion before the clerk of the court to have the authority of the administrator revoked, and Lewis Poff appointed administrator in his stead. The administrator attended at the time and place appointed, but none of the parties appeared. On that occasion the widow and daughters of decedent addressed written requests to the clerk not to revoke the authority of the administrator as they desired him to administer on the estate.

On June 28, 1915, William H. Poff served notice on the administrator that on July 1, 1915, he would move the judge of the circuit court of the county to revoke the administrator's authority and grant letters of administration to him; but the judge, after hearing the evidence, overruled that motion. Thereupon William H. Poff, A. E. Poff and Lewis Poff appeared before the clerk and noted an appeal from the order appointing plaintiff in error administrator, but failed to prosecute that appeal. And finally, on August 7, 1915, Lewis Poff again applied to have himself appointed administrator. From an order of the clerk denying the application he appealed to the circuit court, which entered the order under review vacating the appointment of the plaintiff in error and granting letters of administration with the will annexed to Lewis Poff.

The case virtually depends upon the construction of sections 2637, 2639 and 2640 of the Code of 1904.

It is provided by section 2637 that, "If there be no executor appointed by the will, or if all the executors therein

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named refuse the executorship, or fail when requested to give such bond, which shall amount to such refusal, the said court or clerk may grant administration with the will annexed, to the person who would have been entitled to administration if there had been no will, upon his taking such oath and giving such bond."

Section 2639 provides that where a person dies intestate, "Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the said distributees may at any time waive their right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person."

It is contended by the defendant in error that because the four sons of J. W. Poff, on whose motion plaintiff in error was appointed administrator with the will annexed, were devisees under testator's will they were not entitled to administration themselves, and, therefore, could not designate any other person to be appointed in their stead.

This contention is in conflict with section 2637 of the Code, as construed by this court in *Smith* v. *Lurty*, 107 Va. 548, 59 S. E. 403. In that case the executor named in the will was permitted to resign; and, thereupon, the widow moved the court to grant her letters of administration with the will annexed, and, alternately, should that request be denied, to grant administration to her nominee. The motion was opposed by Susie Smith, a devisee and legatee under the will (but who would not have been a distributee in case of intestacy) who moved the court to grant administration to the curator of the estate. The next of kin (the brothers and sister of testator, who died leaving no de-

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scendants) did not oppose the appointment of the widow, but asked, in the event her motion was denied, that administration be granted to the husband of testator's sister. These motions were heard together, and "the court overruled the motions of the widow and Susie Smith, respectively, sustained the motion of the brothers and sister of the testator, and appointed the husband of the latter administrator with the will annexed." Buchanan, J., observes: "By section 2639 it is provided that when a person dies intestate, 'administration shall be granted to the distributees who apply therefor, preferring first the husband and wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of said distributees may, at any time, waive the right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person.'" It was conceded in that case that the widow, if a suitable person, would have had the preferable right to qualify as administrator of her husband with the will annexed. But the action of the trial court in refusing her administration was upheld on the ground of her hostility to Miss Smith, the principal devisee and legatee, and also because both as plaintiff and defendant she was engaged in litigation with the curator, asserting title to property which her husband had attempted to dispose of by his will. The court was furthermore of opinion, for the reasons stated, that having been refused the right to qualify herself, she could not designate a substitute to be appointed. The court, moreover, agreed with the circuit court in its refusal to permit Miss Smith to designate an appointee, because though a devisee and legatee under the will, she was a stranger in blood to the testator, and, therefore, would not have been a distributee in case of intestacy. For, says

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the court, "the word 'distributees,' as used in the sections quoted, clearly means those who would be entitled under the statute of distribution to the personal estate of the decedent if he had died intestate. Not being a distributee, she had no preferable claim to be appointed administrator, nor preferable right to designate another to be so appointed under the statute."

Conversely, it is plain that the four sons of J. W. Poff, on whose motion appellant was appointed administrator, although devisees and legatees under the will, would have been distributees had testator died intestate, and by the terms of the statute were entitled to apply for administration themselves, and consequently might, "at any time waive their right to qualify in favor of any other person to be designated by them."

Reading sections 2637 and 2639 together, it is clear, we think, that a distributee who applies for administration and is appointed and qualifies can only be removed *for cause;* and that the same principle applies to an appointee in whose favor a distributee waives his right to qualify. By substitution such person is clothed with all the rights of the distributee and occupies the same plane. When, therefore, the appointment, either of a distributee or of some other person designated by him, has been made and the appointee has qualified, the power of the court or clerk is exhausted, and no further appointment can be made until a vacancy occurs in the office in some way recognized by law.

The suggestion that such construction unduly discriminates between distributees of the same class is without merit. The statute contemplates a possible preference in favor of suitable distributees in the order in which they apply for appointment; and to the diligent in this instance, as in others, the maxim, "*Qui prior est tempore, prior est jure,*" applies.

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Nor do we consider that the interpretation placed on section 2639 is in any way affected by section 2640. As we have seen, the concluding sentence of section 2639 reads: "If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person." By act approved December 10, 1903 (Acts 1902-3-4, pp. 593-4), the following words were incorporated in section 2639, *"But any of the said distributees may at any time waive their right to qualify in favor of any other person to be designated by them."*

It will be perceived that, after the amendment, section 2639 dealt with two classes of persons who were eligible to appointment as administrators: (1) To distributees who applied therefor or to any other person in whose favor any of the said distributees *at any time* waived their right to qualify; and (2) to one or more of the creditors or any other person *after the expiration of thirty days from the death of the intestate.* Appellees rely on the following provision in section 2640 (which, in that respect, has remained without change since the Code of 1849) to maintain their right to the administration, "* * * if, after administration is granted to a creditor or other person than a distributee, any distributee who shall not have before refused shall apply for administration, there may be a grant * * * of administration, after reasonable notice to such creditor or other person, in like manner as if the former grant had not been made; and the said former grant shall thereupon cease." The history of the legislation as well as the language just quoted show that it was intended to apply only to persons included in class "(2)" and not to those enumerated in class "(1)" of section 2639, as amended. There could be no doubt of the correctness of this interpretation of section 2640 prior to the amendment of December 10, 1903, enlarging the class of eligibles to appointment within

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thirty days from the death of the intestate, because there was no other class to which it could apply. And it would be unreasonable to presume, without some change of language, a legislative purpose to emasculate the important amendment carried into section 2639. The natural and ordinary meaning of the words, "waiving a right in favor of another," imports an investure of such other with the right waived; and it is not to be supposed that the legislature would confer a right on a class, introduced in the law for the first time, by one section merely to deprive them of that right by the following section.

In the instant case, four out of seven of testator's sons within thirty days from the death of their father, applied for administration of his estate in behalf of plaintiff in error, M. H. Tompkins, and waived their right to qualify in his favor. This right, by the express terms of the statute, they had the privilege to exercise "at any time." The incumbent was likewise the choice of the wife, who is first to be preferred, and both daughters of the decedent. His fitness for the office of administrator is not questioned in this record; his eligibility to appointment is plain, and under the evidence his authority as administrator ought not to have been revoked.

For these reasons, the order of October 6, 1915, granting letters of administration with the will annexed of J. W. Poff to defendant in error, Lewis Poff, and revoking the appointment of the plaintiff in error, M. H. Tompkins, as such administrator, is erroneous and must be reversed and annulled, and said proceeding dismissed with costs to the plaintiff in error against the defendant in error both in the circuit court and in this court.

SIMS, J., dissenting:

My understanding of the contention of the defendant in error is that the four sons of decedent, on whose motion the

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plaintiff in error, M. H. Tompkins, was appointed administrator with the will annexed, were not entitled to any share of the personal estate for the reason that all of the real estate was devised to them which was an advancement to them, and exceeded in value their share of the whole estate; that because they were not entitled to any share of the personal estate, they were not interested therein, and were not "distributees" of the decedent within the meaning of section 2639 of the Code of Virginia; and that, therefore, they were not entitled to administer themselves, and, hence, were not entitled to designate any other person to be appointed in their stead, under such statute.

The question thus raised, whether, in addition to being of the class that ordinarily takes under the statute of distribution a share of the personal estate, a person must also in fact take a share in such estate as distributee, in order to come within the meaning of section 2639 so as to be a "distributee," is, I think, an open question in Virginia.

I cannot agree with the view expressed in the above opinion that the case of *Smith* v. *Lurty*, 107 Va. 548, 59 S. E. 403, construes section 2637—or section 2639—of the Code to mean that one having no beneficial interest in the estate is a "distributee" within the meaning of these sections. That question was not involved in that case so far as I can discover. On the contrary, the court therein, in referring to the "brothers and sisters" of the decedent whose designee the court held entitled to qualify, stated: *"They were interested in the decedent's estate,* were clearly within the meaning of the statute and the court did not err in granting letters of administration to the person designated by them, *under the facts of the case."* (Italics mine.)

And in the instant case this question is not involved because the widow and daughters, who were distributees having in fact a beneficial interest in the personal estate also, subsequently to his qualification, designated M. H. Tompkins as the person they wished to administer on the estate.

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The question presented to this court for decision in the instant case, as I understand it, is—

1. What is the right of a distributee, who is beneficially interested in the personal estate of the decedent, with respect to grant to him of administration upon his applying therefor, after administration has been granted to a designee of other distributees alike beneficially interested in such estate?

Section 2637 of the Code of Virginia places the case of qualification of an administrator c. t. a. on the same footing *quoad* the *persons* entitled to qualify as an administrator of an intestate—*i. e.*, as fixed by section 2639.

Section 2639 is as follows:

"Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk may think fit. *But any of said distributees may at any time waive their right to qualify in favor of any other person to be designated by them.* If no distributee apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors or to any other person." (Words in italics added to the statute by Acts 1902-3-4, p. 594.)

Section 2640 is, so far as relevant, as follows: "* * * if after administration is granted to a creditor or other person than a distributee, any distributee who shall not have before refused shall apply for administration, there may be * * * grant of administration after reasonable notice to such creditor or other person in like manner as if the former grant had not been made and the said former grant shall thereupon cease."

Sections 2639 and 2640 should be construed together.

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Section 2639 expressly provides that only in case "no distributee apply for administration within thirty days from the death of the intestate" can the court or clerk grant administration to "any other person" than a distributee.

Section 2640 provides expressly that in case of grant of administration to "any other person," if thereafter "any distributee * * * shall apply, there may be * * * grant of administration * * * in like manner as if the former grant had not been made and the said former grant shall thereupon cease."

It seems to me that section 2639 gives to each and all of the distributees mentioned therein whom the court or clerk may think fit the right, in turn, to apply for grant of administration—first the husband or wife, and after them all of such others as are "entitled to distribution."

It seems to me that the right of a designee under the statute to qualify, by the plain terms of the statute law itself, is, as provided by section 2639, upon condition that "no distributee apply for administration within thirty days from the death of the intestate," and, as provided by section 2640, upon condition that if after administration has been granted to him "any distributee who shall not have before refused shall apply for administration," there "may be grant of administration" to any such distributee "in like manner as if the former grant had not been made and the said former grant shall thereupon cease."

It is true that under the amendment to section 2639 above italicised, "any distributees may *at any time* waive their right to qualify in favor of any other person to be designated by them"; but clearly they can waive only their own right, and not that of other distributees. Therefore, in a contest between a distributee who has not waived such right (being also thought by the clerk or court to be a "fit" person) and "any other person," (although the latter may

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be a "designee" as above defined), for grant of administration, this amendment seems to have no application.

It will be noted that the amendment under consideration was incorporated into the body of section 2639; that it uses the language "any other person" in the amendment itself as descriptive of a designee in whose favor any distributees may waive their right to qualify; which very language, to-wit, "any other person," is used in the subsequent portion of section 2639 as descriptive of those other than distributees who may be permitted to qualify in a certain event, namely, under section 2639, "any other person" than a distributee may be permitted to qualify only in the event that no distributee apply for administration within thirty days from the death of the intestate; and as descriptive of those other than distributees whose qualification, after it has been granted, must give way in favor of any distributee applying for grant of administration, namely, under section 2640, in the event that after administration is granted to any other person than a distributee, any distributee who shall not have before refused shall apply for administration. I cannot escape the conviction that the legislature used the language "any other person" with the same meaning in the different places in which it occurs in sections 2639 and 2640, or must be held by the courts to have done so. I think the proper rule for courts to pursue is to let the legislature speak for itself, when the language of a statute as enacted is clear, and that no construction ought to be allowed against its plain meaning, unless the consequences are such as to contravene a paramount law, or are repugnant to common reason or natural equity. *Commonwealth* v. *Gaines,* 2 Va. Cas. (4 Va.) 172. See to same effect *Ryan* v. *Krise,* 89 Va. 729, 17 S. E. 128; *Price* v. *Harrison,* 31 Gratt. (72 Va.) 114, 117-8; *Johnson* v. *Mann,* 77 Va. 265. The same rule holds in reference to the inquiry as to what falls within the equity of a statute. As said by Burks, J., in the

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case of *Price* v. *Harrison, supra,* where there was an amendment of a statute by the insertion of certain new language:

"Where the language is free from ambiguity and the intention is plainly manifested by it, there is no room for construction. The general rule is that a legislative act should be read according to the ordinary and grammatical sense of the words. * * *

"It was observed by Lord Tenterden that 'there is always danger in giving effect to what is called the equity of a statute; it is much safer and better to rely on and abide by the plain words, although the legislature may have provided for other cases, had their attention been directed to them.' 6 B. & C. 474."

Hence, while it is true that the amendment of section 2639 above referred to brings within the operation of such statute a new class of persons, in addition to "class 2," and in addition to "class 1", referred to in the opinion above, namely, designees of distributees, the statute itself does not give to such *designees* all of the rights of *distributees.* It is true that, looking alone to the interest of designees, the equity of the statute would seem to call for the designee of distributees being allowed to occupy the same position in all respects as the distributees who waive their right to qualify in favor of such designees, and it may be that the legislature would have so provided had their attention been directed to the qualified rights given designees of distributees by the incorporation of the amendment in the body of section 2639 and by the use of the language which was used; on the other hand, it may be that the legislature might not have been willing to so provide. Clearly, the statute itself as amended does not in terms go that far.

Again: Under this statute, section 2639, and also under section 2640, we see that *all* distributees mentioned therein whom the court or clerk may think fit are given the rights above referred to with respect to applying themselves for

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grant of administration and of designating "any other person" in whose favor they waive their right to qualify. A proper construction of these statutes, or of either of them, requires, therefore, that we must not lose sight of but look also to the interest of a distributee applying for grant of administration. To give the meaning to the statute contended for in favor of designees, would destroy the rights of other distributees, who have not waived their rights in favor of any designee, given such distributees by the express terms of the statute in both sections under consideration.

It is true that "the statute contemplates a possible preference in favor of suitable distributees in the order in which they apply for appointment and that to the diligent in such instance, as in others, the maxim *"Qui prior est tempore, prior est jure,"* applies, as between distributees; but as to "any other person," the statute itself expressly sets apart a time, sufficiently brief, in which the minds of those concerned may be left undisturbed by the need for haste in turning from paying a decent respect to the memory of the dead to litigation over his estate, before any one other than a distributee shall be allowed to qualify on the estate.

In the case before us another person than a distributee qualified within three days after the death of the intestate. This circumstance, while of no determining importance with regard to the question we have under consideration, demonstrates the wisdom of the statute in effect forbidding any qualification of "any other person" than a distributee before the expiration of such thirty day limit. The qualification of distributees within this limit is permitted out of necessity since the exigencies of the situation of the estate may require it in some cases, and the distributees in the nature of things know each other and their fitness to administer upon the estate. But as to "any other person," the designee of one or more distributees, it would not be

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reasonable to assume that all distributees would be informed as to his fitness for the trust, and it would not be in consonance with the policy of the statute in giving the thirty day rest period to require that all distributees should be on the alert during such period to inform themselves in regard to such fitness of other persons than distributees who might chance to be designated by other distributees, and that all distributees should keep themselves in readiness for urging such non-fitness of any such designees or making application in person for grant of administration, before the clerk or court, from the very instant of the death of the intestate, under pain of losing their own right of designating some person to qualify or of later applying for qualification themselves—rights expressly given them by statute.

In the case before us, M. H. Tompkins, first allowed to qualify as administrator with the will annexed, in addition to being the designee of the four younger sons of the decedent, was the subsequent designee of the widow and daughter of the decedent, but was not himself a distributee of the estate. After such administration was granted, Lewis Poff, a son and distributee of the estate and beneficially interested therein, applied for grant of administration, and by the order of court complained of was appointed administrator, and the former grant of administration to Tompkins was vacated. I think this was in accordance with the statute law of the State on the subject, and that the action of the court below should be affirmed.

Reversed.

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Richmond

WARWICK COUNTY AND OTHERS v. CITY OF NEWPORT NEWS.

November 16, 1916.

Absent, Sims, J.*

1. MUNICIPAL CORPORATIONS—*Annexation Ordinance—How Construed—Case at Bar.*—The annexation ordinance in the case at bar is to be read as a whole, and in the light of the court's order of annexation and of the statute, and, when so read and interpreted, it is plain that the council of the city is not authorized or empowered to apply the revenues derived from the annexed territory, during the period of the first five years from the date of annexation, to the improvement of other property of the city.
2. APPEAL AND ERROR—*Assignment of Error—Waiver.*—An assignment of error to the improper admission of evidence, and of evidence "of a character so intangible as to be not capable of being rebutted," but which does not call attention to any particular evidence as improperly admitted, and which has not been argued, either orally or in briefs, must be regarded as waived.
3. MUNICIPAL CORPORATIONS—*Annexation of Territory—Loss of Revenue to County—Extension Considered as Entirety.*—Although the annexation of a part of a county to a city may temporarily embarrass somewhat the county with respect to its revenue, that cannot be made the criterion by which the question of annexation is to be adjudged. The proposed extension must be considered as an entirety, and the rights and interests as well of those within the city as of those without are to be taken into consideration.
4. MUNICIPAL CORPORATIONS—*Annexation Ordinance—How Considered—Including Unplatted Land—Reasonableness.*—An extension ordinance must be considered as a whole, and is not unreasonable because there is embraced in the land proposed to be taken in unplatted or even marsh lands not needed by the city in the reasonably near future, for development and expansion. There may be, and in the case at bar were, other good and sufficient reasons why such lands should be so embraced.

*Submitted before Judge Sims took his seat.

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5. APPEAL AND ERROR—*Extension Order—Fixing New Date For Effectiveness.*—Where the date fixed by the trial court for an extension ordinance to go into effect has passed pending an appeal from the order of extension, this court, on affirming the judgment, will fix a new date for the ordinance to go into effect.

Error to a judgment of the Circuit Court of Warwick county in an annexation proceeding. Judgment for the petitioners. Defendants assign error.

Affirmed.

The annexation ordinances and the order appealed from are as follows:

An ordinance to extend the corporate limits of the City of Newport News in pursuance of the provisions of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a, Virginia Code, 1904.

Be it ordained by the council of the city of Newport News:

1. That the city of Newport News hereby declares that it desires to annex in pursuance of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a, Virginia Code 1904, certain territory lying in the county of Warwick, adjacent to the present corporate limits of the city of Newport News, and to that end it doth hereby accurately describe the metes and bounds of such territory as follows:

All that territory lying between the present city limits, as established by an act of the legislature of Virginia, and the following boundary line: Beginning at the intersection of the centre line of Marshall avenue, and the southerly city limits, thence southerly along the centre line of Marshall avenue extended, to low water mark on Hampton roads, thence westerly along low water mark on Hampton roads to low water mark on James river, thence north-

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westerly along low water mark on James river to its intersection with the present southerly city limits.

2. That the necessity for and the expediency of annexing the proposed territory is to give better health, police and fire protection and public school facilities in that territory, than the county in which it is located is enabled with the means at its command, to afford to such community, and, as a result, it endangers the safety of life, health and property, not only without, but within the corporate limits, a part of the said teritory being built up to the city limits.

3. That the territory proposed to be annexed is adjacent to the city on its southerly side, and about fifteen miles from the county seat of said county, and is already built upon, though without any sufficient system of sewers, water or gas, or street or other improvements therein, making it not only expedient, but necessary that some complete system of sewerage be promptly provided for the proper sanitation and improvement of such territory, and for the easy and convenient transaction of business with the residents of the city of Newport News and through its courts.

4. The terms and conditions upon which it desires to make the proposed annexation, and provision for the future management of the annexed territory are as follows:

(a) That the city of Newport News, shall assume and provide for the reimbursement of the county of a just proportion of any existing debt of said county, if any there be, and shall also make compensation to the said county for any school house or other public building of said county, located within the annexed territory.

(b) That the tax rate upon the land within the annexed territory shall not be increased beyond the rate assessed by the county in which it is located for its purposes at the time of the annexation under this ordinance for a period of five years after such annexation, except upon petition of the majority of the freeholders of the territory annexed.

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(c) That all revenues derived by the said city of Newport News from taxation in said territory during the first period of five years, either on property or from other sources, including licenses, shall be wholly expended by the city of Newport News upon streets, sewers, lights, water and other public improvements in the territory annexed, provided, however, that at any time within the said five years, the council of the city of Newport News, may, by ordinance, set apart a sum equal to twelve per centum of the assessed value at the time of the annexation, of the lands annexed, or of such part thereof, as may be determined upon by the said council, which sums so set apart, shall be wholly expended in public improvements in and for the benefit of the annexed territory, or part thereof, as may be determined as aforesaid; and when said sum shall have been so set apart and said public improvements shall have been begun, the land annexed, or part thereof, as aforesaid, shall be subject to the city tax rate, and the proceeds thereof shall be paid into the city treasury, along with all other taxes and licenses in such territory for general purposes, although said five years shall not have elapsed, provided that the said sum to be set apart and expended shall be reduced by the sum already expended in said improvements under any other plan of annexation, provided further that out of the proceeds of sale of the next issue of bonds by the city of Newport News, after such annexation, the said sum equal to the said twelve per centum of the assessed value at the time of annexation of the land annexed, reduced by the sums hereinbefore mentioned shall be set apart and expended in said territory as hereinbefore directed, unless said sum has been already so expended.

(d) That all county levies imposed on persons and property within such territory for the current fiscal year, in which said annexation is made, shall be paid to the county.

(e) That the taxes assessed, collected and expended dur-

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ing the said period of five years shall be so assessed, collected and kept, that the same may be expended as hereinbefore provided in the territory from which it was so collected, until and unless a sum be set apart equal to twelve per centum of the assessed value at the time of the annexation of the lands annexed, and when said sum shall have been so set part, and the public improvements shall have been begun, the land annexed shall be subject to the city tax rate.

(f) That the city of Newport News will, as soon as annexation is accomplished, afford police and fire protection and public school facilities to the citizens residing in the annexed territory; and will, with all reasonable dispatch, afford and furnish other public facilities and improvements to said citizens, as provided by law.

5. That an additional necessity for expediency of annexing the proposed territory is that within that territory proposed to be annexed, the city owns a large tract of land and is upon said tract constructing at a large expense, a safe harbor for small boats, on the shores of which it hopes to locate many small industries, and that it is constructing from said property a deep water pier where steamers and other large vessels may land to receive and discharge cargoes.

6. That the city attorney be, and he is hereby instructed to institute and prosecute with as little delay as possible the necessary legal proceedings in order to annex to the city of Newport News by proper decree or judgment the territory hereinbefore accurately described, upon the terms and conditions hereinbefore set forth.

This ordinance shall be in force from its passage, April 6, 1914.

An ordinance to amend an ordinance to extend the corporate limits of the city of Newport News, in pursuance of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a Virginia Code, 104, approved April 6, 1914.

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Be it ordained by the council of the city of Newport News that an ordinance to extend the corporate limits of the city of Newport News, in pursuance of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a, Virginia Code, be amended and re-ordained to read as follows:

1. That the city of Newport News hereby declares that it desires to annex in pursuance of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a, Virginia Code, 1904, and acts amendatory thereof, certain territory lying in the county of Warwick, adjacent to the present corporate limits of the city of Newport News, and to that end, it doth hereby accurately describe the metes and bounds of such territory, as follows:

All that territory lying between the present city limits, as established by an act of the legislature of Virginia, and the following boundary line: Beginning at the intersection of the centre line of Marshall avenue, and the southerly city limits, thence southerly along the centre line of Marshall avenue extended, to low water mark on Hampton roads, thence westerly along low water mark on Hampton roads to low water mark on James river, thence northwesterly along low water mark on James river to its intersection with the present southerly city limits.

2. That the necessity for and the expediency of annexing the proposed territory is as follows:

(a) To give better health, police and fire protection, and public school facilities in that territory than the county in which it is located affords to that community.

(b) That a large part of the said territory has been subdivided into city lots and blocks, and much of it is built up to the present city limits, being separated therefrom only by a street, and is without any sufficient system of sewers, drainage, water, gas, street or other improvements therein making it not only expedient, but necessary that some com-

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plete system of public improvements shall be adopted in said territory for the safety of the life, health and property therein, as well as within the city of Newport News.

(c) The chief business and sources of employment in the city of Newport News and this adjoining territory is shipbuilding and shipping, much of the latter being the transportation of great quantities of coal to other seaports. Since the incorporation of the city of Newport News, owing to the erection and construction of new coal piers on private property outside of the city limits, and the abandonment of those formerly within the city limits, all of the coal handled, both for coastwise and foreign trade, whether bunker or cargo, is loaded immediately outside of the city, and is likewise much of the other merchandise received and discharged at this port of entry, and numerous steamers, both foreign and coastwise, call at these docks so immediately outside of the city limits, and great numbers of laborers are employed thereon, and sailors of all nationalities from these vessels are passing to and from the city (over private property and private right of ways), rendering the necessity imperative that the city shall be given jurisdiction over this territory.

(d) That the territory proposed to be annexed is fifteen miles from the county seat, and is adjacent to the city on its southerly side, is in the line of its inevitable business growth, and is entirely cut off by the location of the city of Neport News from the larger part of said county. All of the business on these docks and piers, and most of the business of all persons residing or trading in said territory is transacted with residents of the city of Newport News, or in offices located within the city limits, and it will greatly expedite the transaction of such business to have the said territory brought within the corporate limits of said city.

(e) That the inhabitants of this territory, and the persons owning property and transacting business therein, en-

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joy many of the advantages of the city streets and improvements, and much protection from the police and fire departments of the city, and their lands are thereby increased in value, without the payment of any taxes to the city therefor.

(f) That the city has improved many of its streets up to the city limits, opposite the said territory; and the said territory should be annexed in order that there may be some means provided for the opening, improving and maintaining of highways therein, as well as the improvement and maintenance of those already laid out.

(g) That within the territory proposed to be annexed, the city owns a large tract of land on Newport News creek, and is therein excavating and constructing at a large expense, a harbor for small boats (on the land so owned by the city, and upon the land adjacent thereto, it contemplates and expects industries to be located), and it is constructing at the mouth of this harbor, a pier where steamers and large vessels may land to receive and discharge cargoes. All of this property, and that adjoining comprised in this territory, should be annexed to the city, so as to subject the same and the persons doing business thereon to the laws and ordinances of said city, and for the benefit of municipal fire, police and health regulations, and also that the city may condemn land for the necessary streets, in the development of said territory.

3. The terms and conditions upon which it desires to make the proposed annexation, and provision for the future management of the annexed territory, are as follows:

(a) That a part of the territory described, if annexed, will be attached to the present first ward of the city, and the remainder thereof will be attached to the second ward of said city, as provided by law.

(b) That the city of Newport News shall assume and provide for the reimbursement of the county of a just propor-

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tion of any existing debt of said county, if any there be, and shall also make compensation to the said county for any school house or other public building of said county, located within the annexed territory.

(c) That the tax rate upon the land within the annexed territory shall not be increased beyond the rate assessed by the county in which it is located for its purposes at the time of the annexation under this ordinance for a period of five years after such annexation, except upon a petition of the majority of the freeholders of the territory annexed.

(d) That all revenues derived by the said city of Newport News from taxation in said territory during the first period of five years, either on property or from other sources, including licenses, shall be wholly expended by the city of Newport News upon streets, sewers, lights, water and other public improvements in the territory annexed, provided, however, that at any time within the said five years, the council of the city of Newport News may, by ordinance set apart a sum equal to twelve per centum of the assessed value at the time of the annexation, of the lands annexed, or of such part thereof as may be determined upon by the said council, which sums so set apart, shall be wholly expended in public improvements in and for the benefit of the annexed territory, or part thereof as may be determined as aforesaid; and when said sum shall have been so set apart and said public improvements shall have been begun, the land annexed, or part thereof, as aforesaid shall be subject to the city tax rate and the proceeds thereof shall be paid into the city treasury, along with all other taxes and licenses in such territory for general purposes, although said five years shall not have elapsed, provided that the said sum to be set apart and expended shall be reduced by the sum already expended in said improvements under any other plan of annexation, provided further, that out of the proceeds of said sale of the next issue of bonds by the city of Newport News,

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after such annexation, the said sum equal to the said twelve per centum of the assessed value at the time of the annexation of the land annexed, reduced by the sums hereinbefore mentioned, shall be set apart and expended in said territory as hereinbefore directed, unless said sum has been already so expended.

(e) That all county levies imposed on persons and property within such territory for the current fiscal year, in which said annexation is made, shall be paid to the county.

(f) That the taxes assessed, collected and expended during the said period of five years shall be so assessed, collected and kept, that the same may be expended as hereinbefore provided in the territory from which it was so collected, until and unless a sum be set apart equal to twelve per centum of the assessed value at the time of the annexation of the lands annexed, and when said sum shall have been so set apart, and the public improvements shall have been begun, the land annexed shall be subject to the city tax rate.

(g) That the city of Newport News will, as soon as annexation is accomplished, afford police and fire protection and public school facilities to the citizens residing in the annexed territory; and will, with all reasonable dispatch, afford and furnish other public facilities and improvements to said citizens, as provided by law.

(h) That all the school children living in Warwick county, and now attending school in the annexed territory, shall have the right to so continue for a period of three years from the date of annexation to attend such school, or such other school in the city as the school board may prescribe.

4. That the city attorney be and he is hereby instructed to institute and prosecute with as little delay as possible, the necessary legal proceedings in order to annex to the city of Newport News by proper order, decree or judgment, the

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territory hereinbefore accurately described, upon the terms and conditions hereinbefore set forth.

This ordinance shall be in force from its passage.

Order in vacation.

This cause which came on to be heard on the proceedings heretofore had, the petition of the city of Newport News, and the answers filed herein, and the court having carefully considered all of the evidence, parol and written, including maps, documents, records and exhibits, and after a full view by the court itself of the territory sought to be annexed, and after hearing the arguments of counsel, and entering an order making this a vacation cause, the court taking time to consider, is now of opinion:

1. That it is necessary and expedient that the corporate limits of the city of Newport News should be extended for the reasons set forth in section 2 of the ordinance of the city of Newport News, approved by the mayor on the 16th day of July, 1914, and as stated in the opinion in writing herewith filed and made a part of the record, marked "A."

2. That the corporate limits of the city of Newport News should be extended as in section 1 of said ordinance recited, the lines of annexation being so drawn as to contain a reasonably compact body of land, and the court being careful to see that no land is taken into the said city of Newport News which is not adapted to city improvements unless necessarily embraced in said compact body of land, and being careful also to exclude such land as the city of Newport News will not need in the reasonably near future for development, and has also considered the loss of revenue to the county.

3. That the terms, conditions, and provisions set forth in said ordinance are reasonable and fair, except as to subsection (h) of section 3, dealing with school children, which terms are changed as hereinafter set out, and just provisions are made for the control, management and improve-

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ment of such territory, and also except as hereinafter specified.

4. Upon consideration whereof, it is adjudged, ordered and decreed that the following territory be and is hereby annexed to the city of Newport News from the county of Warwick.

All that territory lying between the present southerly city limits, as established by an act of the legislature of Virginia, approved January 16, 1896, and the following boundary line: Beginning at the intersection of the center line of Marshall avenue, and the southerly city limits, thence southerly along the center line of Marshall avenue extended and projected in a straight line, to low water mark on Hampton roads, thence westerly along low water mark on Hampton roads to low water mark on James river, thence northwesterly along low water mark on James river to its intersection with the present southerly city limits.

5. That the city of Newport News shall pay to the county of Warwick the sum of five thousand dollars ($5,000.00) for the school building not reserved to the said county, and located on Eighteenth street between Madison and Marshall avenues in the annexed territory, which said sum shall be paid on or before December 31, 1914, to the proper county authorities. If not so paid, then the payment thereof shall be enforceable by every appropriate legal remedy, and the title in fee simple to the property for which such payment is made, shall thereupon be transferred to and be hereby absolutely vested in the city of Newport News.

6. That until the 1st day of September, 1923, all school children living in Newport district of said county within a radius of two miles of the present location of any public school building in said city, shall have the right, free of charge, to attend the graded and primary schools of said city under the same regulations as are from time to time applicable to the children resident in the said city. Any

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child resident of any portion of Newport district otherwise qualified for admission to the public high school or public high schools of said city shall have the privilege to attend free of charge and subject to the same rules and regulations as are from time to time prescribed for high school children resident in said city.

7. That all taxes and licenses accruing during the year 1914 in the annexed territory, and all years prior thereto, shall be payable to and collected by Newport district and the county of Warwick.

8. That the city shall proceed with all reasonable diligence to adequately provide for the police, sanitary, and fire protection of the annexed territory.

9. That the city of Newport News shall by ordinance organize the annexed territory either into a new ward or wards, or attach the same to existing wards of the city of Newport News, and further proceed in a manner prescribed by section 8 of an act of the General Assembly of Virginia, approved March 10, 1904, so as to fully guarantee and accord to each person within said annexed territory every right secured to them under said section 8 of said act.

10. That all the terms and conditions set forth in the ordinance approved on the 16th day of July, 1914, entitled "An ordinance to amend an ordinance to extend the corporate limits of the city of Newport News in pursuance of an act of the General Assembly of Virginia, approved March 10, 1904, and known as section 1014-a Virginia Code, 1904, approved April 6, 1914," are hereby ratified and approved by the court as reasonable and just and are declared to be binding upon the city of Newport News, except so far as the same are modified by or in conflict with this order.

11. That the term of office of any county or district officer residing within the bounds of the said annexed territory shall be unaffected by said annexation, as provided by sec-

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tion 11 of said act, approved March 10, 1904, but he shall have no jurisdiction in the annexed territory.

12. That the provisions of this decree ordering the annexation of the territory hereinbefore set forth shall take effect and be in force from and after the 31st day of December, 1914.

13. That all fees for the service of papers in these proceedings and all other court costs shall be paid by the said city of Newport News.

And by consent of parties hereto entered of record, leave is given the defendants or any of them to file their bill of exceptions on or before December 31, 1914.

T. W. H.

S. Gordon Cumming, J. Winston Read, Phillip St. George Wilson and *H. T. Wickham*, for the plaintiffs in error.

J. A. Massie, for the defendant in error.

CARDWELL, P., delivered the opinion of the court.

This is a proceeding upon petition under the statute, filed by the city of Newport News in the Circuit Court of Warwick county, for the annexation to the city of certain territory belonging to the county of Warwick, described in an ordinance adopted by the council of the city, and pursuant to the provisions of the statute in such cases made and provided, the Governor of the State designated the Honorable Thomas W. Harrison, judge of the seventeenth judicial circuit, to hear the case and to determine the issues therein.

At the final hearing of the cause the learned judge presiding filed with and made a part of the record a memorandum of opinion succinctly summarizing the evidence in the case, and stating the facts deducible therefrom so clearly and fully that we deem it unnecessary to attempt to again

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review the evidence here, and, therefore, adopt the said written memorandum of the trial judge as a part of the opinion of this court, it being as follows:

"There is little or no controversy in the testimony on any essential point. The facts may, therefore, be very briefly summarized.

"The city seeks to annex a large tract of land interposed between its eastern line and the water front. The population of this territory is given in the city census, which by its particularity challenges criticism and invites detection of error, at about nineteen hundred, of which sixteen hundred are congested along certain so-called streets or avenues, notably Twentieth street, Ivy avenue and Madison avenue, in the northern portion of the territory, and three hundred in a settlement known as Dawson City in the southeast portion, to which there seems no access by any public highway. With the exception of about fifteen, the population is negro. Not only is it negro, but embraces some very bad types of that race. Without considering hearsay or reputation evidence, the direct evidence shows that just outside of the city limits negro dance halls, gambling joints and other disorderly negro resorts are maintained, and that neither the negro police justice nor the county police have control of the situation.

"There is but one public highway in the district, about fourteen hundred feet, over which the county assumes any control. The other so-called streets and avenues are not public highways.

"There are no sewers. The county superintendent of roads, in addition to the duties usually pertaining to that office, is the sanitary officer and supervises the removal of garbage or other unsanitary matter at convenient periods. The county board of health, however, impressed me as energetic and capable men, who discharged their duties energetically within the limits of the resources at their command.

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"The fire protection in this northern section consists of three water plugs, five hundred feet of hose, and a casual bucket-brigade.

"South of this populated section there is quite a large body of unplatted land. But in this section the city has purchased land, and, at the expenditure of some two hundred and fifty thousand dollars, projected an ambitious scheme of development. It has constructed or has under construction a municipal pier, a small boat harbor and streets or avenues furnishing approaches to its water ways, and holds convenient sites for manufacturing or commercial plants, which it may be able to locate.

"Nor is the unplatted land in a strict sense agricultural land. Neither its assessed nor actual value is predicated on its value as an agricultural investment. Most of it is incapable of cultivation. Its value is the speculative growth of the city capitalized.

"The southern extremity is the railroad property with its valuable improvements. A part of this property is unplatted land, also, but it is evident that it is held in reserve by the railroad, not as agricultural land, nor for that matter as town lots, but for the particular uses of its railroad or terminal purposes. This section is entirely unpopulated except as it may be infested with vicious transients who seek a safe cover for crime along the water or midst the railroad structures.

"The railroad finds it advantageous to have certain of its employees clothed with police powers, but, I take it, as the evidence tends to disclose, that these police agents are naturally disinclined to interfere except as the railroad interests may require it. The railroad also maintains a road or street to its terminals.

"After a careful consideration of the entire evidence and a personal inspection of the territory, I am firmly convinced that under further county control there is little hope for any

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development in this territory, except such as the city may make by the expenditure of its money. Such evil conditions as now prevail will be simply intensified as the negro population grows in number. On the other hand, under the firmer and more aggressive form of government which a city possesses, there is at least the hope that the city will progress to a successful issue of its plan of developments, unobstructed by untoward conditions, which it should have the unrestricted and exclusive power to remove.

"In all annexation proceedings it is necessary to view the proposal from the viewpoint of the State, the city, the county and the territory to be annexed.

"The interest of the State lies along the line which promises the great development. In this case, with the exception of the railroad company, it is hard to understand why the annexed territory should not be greatly benefited. Much of the revenue collected from this territory is now expended in other sections of the county, but, if annexed, under the law, for five years, the entire revenue must be expended in the annexed territory. The railroad company would be benefited by the increase of traffic in case the plans of the city are successful.

"The county does lose some revenue, and I have earnestly considered if the lines could be so drawn as to avoid this, but it seems impracticable. If the line be drawn so as to leave the railroad property in the county, it would mean that this property, in no sense agricultural, abutting upon the city and calling for police supervision, would be entirely segregated from the rest of the county. Entirely without population, a great commercial agency, a shipping and transportation terminal, the county could discharge no public duty with regard to it. It would be a taxable asset and nothing else. An additional objection, too, is that all the burdens which the county now discharges, or ought to discharge, to the rest of the territory would have to be borne by the city.

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I do not believe it feasible to leave this corner, isolated from the county, and virtually in the city, outside of the proposed limits, simply because it is a desirable taxable asset, especially as it produces the injustice suggested. The loss of the county is heaviest in regard to its public schools, and in this respect I think the court can furnish some substantial relief. I think it is entirely within the power of the court to require the city to furnish to the school children, whose school facilities have been impaired, free tuition in the public schools, subject to its supervision. The public schools are not entirely municipal. They are State institutions, sustained in part by the State money, and, because in part sustained by local revenues, it does not mean that they are subject exclusively to local jurisdiction. In order to aid the county and Newport district for the time being, I propose to incorporate into the decree that the city, for the period of ten years, shall, on the same terms as to resident children, free of charge, admit into its colored or white schools—high, graded, primary—any child resident of Newport district, which under the laws may be assigned to the same or on the payment of any charge have the right to attend. Thus, when the county is relieved of its police salaries, its fire expenses, its sanitary and street charges, I believe no increase over the present rate of taxation will become necessary. For the ensuing year it receives the revenue, and before another county levy a new assessment will increase its revenue, I anticipate, sufficiently to avoid increase of levy. At least I hope so. And in considering the relief given the county, consideration ought to be given to the charge which the county not only does incur, but under the proper administration ought to incur.

"In every annexation there is a present loss of revenue to the county, but this is expected to be only temporary. The annexation is supposed to stimulate city growth to the

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extent that in a short time the increased county values will render the loss of revenue negligible.

"The city must pay for the school building, which is valued at $5,000.00.

"The decree should also determine the political status of the inhabitants by assigning the same to some ward of the city. The decree should also fix the day for the same to become effective.

"I have, therefore, concluded to enter a decree annexing the territory on the statutory terms and the terms as to the free schools as herein indicated."

The decree indicated in the trial court's memorandum of opinion was duly entered in the cause, to which decree this writ of error was awarded.

The first error assigned is to the action of the trial court "in overruling the defendant county's motion to quash and dismiss the said proceeding, and in overruling the county's demurrer to the said petition."

The proceeding was instituted pursuant to the statue—section 1014-a, Code 1904—and clause 1 of the statute provides that, "The council shall declare by an ordinance * * * the terms and conditions upon which it desires to annex such territory, as well as the provisions which are made for its future management and improvement."

Objection is urged to the ordinance upon the ground that it does not set forth, as required by the statute, "the provisions which are made for its future management and improvement"—having relation to the territory proposed to be annexed.

The ordinance is, to all intents and purposes, substantially the same as the ordinance proceeded upon and called in question in the case of *Alexandria City* v. *Alexandria County, et als*, 117 Va. 230, 84 S. E. 630, wherein the court's opinion says: "This contention is without merit. As we have observed the ordinance is, *mutatis mutandis*,

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the same as that of the council of the city of Richmond, which came under review in *Henrico County* v. *Richmond City*, 106 Va. page 282, 55 S. E. 683, 117 Am. St. Rep. 1001, *et seq.*, and clearly the sufficiency of the ordinance was a jurisdictional question which the court necessarily had to consider and determine affirmatively in that case before it could, as it did, affirm the judgment of the circuit court annexing certain territory of Henrico county to the city of Richmond."

The form of the ordinance in question here was likewise taken from the ordinance set out and proceeded upon in *Henrico County* v. *Richmond City*, *supra*, and sets forth the case of the city as fully and as explicitly as was practicable under the circumstances; so that the ordinance in the instant case, both as to form and substance, has been twice approved by this court, and no good reason is shown why the court should depart from its former rulings in the cases adverted to.

The further contention is made by the learned counsel for the county of Warwick that even if the ordinance itself be sufficiently explicit as to the future management and improvement of the annexed territory, the trial judge has failed in his order complained of to provide against the misuse of the taxes and levies to be derived by the city from the annexed territory during the next ensuing five years, as indicated in clause 3 of section 1014-a of the Code, *supra*, which provides that, "All revenues derived by such city or town from annexation in said territory during such period (five years), either on property or from other sources, including licenses, shall be wholly expended by such city or town upon street, sewer, light, water or other improvement in said territory." This contention, in so many words, is, "the court in its annexation order has not made any limitation as to how the revenues shall be applied; no person can challenge the discretion or wisdom of the city

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council, in applying all of it to that 'other public improvement,' the small boat harbor."

It would be difficult, as it seems to this court, for the learned judge below to have more safely, minutely and carefully guarded the rights, present and future, of the parties to this litigation than he has done in the order granting the annexation of the territory petitioned for by the city of Newport News, and it is to be presumed and relied upon that the authorities of the city will obey the law of the land and abide by the terms prescribed by the final order of the court in the case. The 10th clause of the order of the court is: "That all the terms and conditions set forth in the ordinance approved on the 16th day of July, 1914, entitled 'An ordinance to amend an ordinance to extend the corporate limits of the city of Newport News in pursuance of an act of the General Asembly of Virginia, approved March 10, 1904, and known as section 1014-a, Virginia Code, 1904, approved April 6, 1914,' are hereby ratified and approved by the court as reasonable and just and are declared to be binding upon the city of Newport News." * * * And "the terms and conditions set forth in the ordinance" referred to in the 10th clause of the court's order, in so far as it relates to revenues to be derived by the city from taxation of property within the annexed territory, or from other sources, etc., are, "That all revenues derived by the said city of Newport News from taxation in the said territory during the first period of five years, either on property or from other sources, including licenses, shall be wholly expended by the city of Newport News upon streets, sewers, lights, water and other public improvements in the territory annexed, provided, however, that at any time within the said five years, the council of the city of Newport News may, by ordinance, set apart a sum equal to twelve per centum of the assessed value at the time of annexation, of the lands annexed, or of such part thereof, as

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2. Every person over twenty-one years of age applying may be determined upon by the said council, which sums so set apart shall be wholly expended in public improvements in and for the benefit of the annexed territory, or part thereof, as may be determined upon as aforesaid; * * *"

The provisions of the ordinance are to be read and interpreted in the light of the whole ordinance, as well as of the court's order of annexation and of the statute, clause 3 of section 1014-a of the Code, *supra*—and when so read and interpreted they are too plain to admit of an interpretation that would authorize or empower the city council to apply, as the learned counsel for the county of Warwick seem to apprehend, the revenues derived from the annexed territory, during the period of the first five years from the date of annexation, to the improvement of "the small boat harbor," constructed and owned by the city.

The second assignment of error relates to the ruling of the trial court in admitting and considering certain evidence which it is alleged was improper and "of a character so intangible as to be not capable of being rebutted;" but this assignment does not call the court's attention to any particular evidence as improperly admitted, and has not been argued, either in the petition for this writ of error or the brief of counsel, and, therefore, it is to be presumed that the assignment is waived.

The third and only remaining assignment of error calls in question the ruling of the trial judge upon the merits of the case.

As will appear upon a reading of the opinion of the presiding judge, quoted above, he did not attempt to analyze the evidence introduced, but the opinion as well as the order entered thereon shows that he considered carefully the entire evidence, including maps, documents, records and exhibits, besides personally viewing the territory sought to be annexed, and the record in the case has been given a most

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careful examination and consideration in this court, resulting in the conclusion that the deductions drawn by the trial judge from the evidence, as stated in his memorandum of opinion, are fully justified, and that the conclusions therefrom, embodied in the court's order, are in accordance with the guiding principles governing the consideration of the case announced by this court in the cases of *Henrico County* v. *Richmond City* and *Alexandria City* v. *Alexandria County et als, supra;* therefore, no good purpose would be served by prolonging this opinion with a discussion of the testimony *pro* and *con* introduced in the case, or of the principles of law applicable to the facts proven. It is true that the case presents some features differentiating it in some respects from the cases heretofore considered by this court and just mentioned, which differentiating features have been ably and forcefully argued by the learned counsel for the county of Warwick, both orally and upon their briefs, but from every standpoint that the record has been viewed by us, they are not of sufficient importance to take the case from under the control of the principles announced by the court in the preceding annexation cases adverted to.

It is also pressed upon us with much earnestness that the taking of this territory from the county of Warwick and annexing it to the city of Newport News would result in a serious reduction of the present revenues of the county derived from taxation, and that the city desires to annex this territory solely for the purposes of revenue. We do not think that the evidence in the case bears out either of these contentions. A few of the answers given by the mayor of the city, when testifying in the case might, if read alone, be construed so as to bear out somewhat the second of these contentions, but when the whole of the witness' testimony is read, a fair interpretation of it is, as it appears to us, merely that the city should annex this territory for the

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purpose of developing its harbor and furnishing better and more sufficient fire and police service and street improvements, and having done that, it should have the taxes from the C. & O. Ry. Company's property, as well as from the remainder of the territory sought to be annexed. It may be that the annexation of this territory will, for a while at least, embarrass somewhat the county of Warwick with respect to its revenues, but that cannot be made the criterion by which the question of annexation is to be adjudged. *Alexandria* v. *Alexandria County, supra;* and *Forbes* v. *Meridian,* 86 Miss. 243, 38 So. 677, where the court's opinion says:

"In passing upon the question of whether an ordinance making an extension of the limits of a municipality be reasonable, the jury must consider the proposed extension as an entirety. The question is not whether each and every portion of the territory included in the proposed extension should or should not, if considered separately of and by itself, have been included, but whether the action of the authorities, in view of the conditions confronting the municipality at the time of the adoption of the ordinance of extension, should be sustained. Nor is the question of the return of revenue which the city may receive from the territory embraced in the extension any criterion by which to judge the reasonableness of the ordinance. Municipalities are not devised for the purpose solely, nor chiefly, of raising revenue. The power of extending corporate limits is granted not to be resorted to for the purpose alone of increasing the income of the municipality, but in order that the benefits incident to civic government may be extended to those resident in the territory adjacent to the municipality and included in the extension; and, further, that the municipality by extending its police government, its sanitary and quarantine regulations, and its more adequate fire protection, may thereby conserve the best interests of the

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inhabitants within its original borders, and also give to those living in the territory included in the extension more efficient protection against devastation by fire, and by the enforcement of necessary sanitary regulations to the public health decrease the danger from disease and pestilence. These are the paramount considerations, and incidental to these the citizens included in the extension are entitled to share in common with the other inhabitants of the municipality the convenience of sidewalks and lighted streets, fire protection, and all other advantages of city life."

It is perhaps true, as is usually the result in these annexation cases, that there are some portions of the area embraced within the boundaries of the territory annexed that may not be needed by the city "in the reasonably near future for development and expansion," but a proposed extension of the limits of the boundaries of the city has to be considered and determined as a whole, and unplatted or even marsh lands between that which should be annexed to the city must of necessity be taken in, which fact does not render the ordinance making the extension unreasonable. 1 McQuillin Mun. Corp., sec. 278; *Alexandria* v. *Alexandria County, supra,* and authorities there cited. When the instant case is so considered, the unplatted or marsh land and other unoccupied or undeveloped properties lying within the boundaries of the territory annexed to the city, as fixed by the trial court's final order, could not have been, as it appears to us, reasonably excluded, especially in view of the peculiar conditions shown to exist within the annexed territory and as to the existence of which there is, in fact, little or no dispute. The conditions referred to are so tersely and plainly stated in the opinion of the trial judge, quoted above, that it is deemed needless to attempt to describe them further here. Suffice it to say that, viewing the proofs in the case from the point of the State, the city of Newport News, and the citizens or owners of prop-

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erty within the territory to be annexed, the court was well warranted in its conclusion that this territory should be annexed to the city and thereby placed under its unrestricted power and exclusive control, not only to the end that the evil conditions now prevailing therein may be removed, but that a greater degree of happiness, progress and safety, not only for the inhabitants of the city, but of the annexed territory and the owners of property situated therein may be provided for and the better assured. We are unable to find in the record any ground for the apprehension of counsel for the county of Warwick that the financial condition of the city of Newport News is such that it will be unable to take care of the territory to be annexed to the city pursuant to a final order in this case.

The order of the trial court provided that the annexation therein determined upon should take effect and be in force from and after the 31st day of December, 1914, but by reason of the suspension of that order during the pendency of this appeal, it becomes necessary, in order to avoid confusion, to change the time at which the annexation shall take place and to amend or modify the seventh clause of the order; therefore, it will be provided by this court that the annexation shall take place and be in force from and after the 31st day of December, 1916, and that clause 7 of the order of the trial court be modified so as to read as follows:

"7. That all taxes and licenses accruing during the year 1916 in the annexed territory, and all years prior thereto, shall be payable to and collected by Newport district and the county of Warwick." Subject to these modifications the judgment of the circuit court is affirmed.

Affirmed.

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Syllabus.

Richmond.

TRESNON, COMMISSIONER, ETC., v. BOARD OF SUPERVISORS OF HENRICO COUNTY.

November 23, 1916.

Absent, Prentis, J.*

1. STATUTES—*Repeal by Implication.*—The repeal of statutes by implication is not favored by the courts, and if two acts dealing with the same subject can be harmonized, it is the duty of the court to give effect to both.
2. STATUTES—*Conflict—Acts 1915, p. 209 and Code, Section 1040-a—Taxation—Bank Stock.*—The act of March 18, 1915, commonly known as the "Bank Act," (Acts 1915, p. 209) relating to taxes on the shares of bank stock, does not in terms refer to section 1040-a of the Code (1904) and there is nothing in the title or body of the act even to suggest a legislative purpose, either by amendment or substitution, to repeal said section. The two acts are harmonious, and, when read together, constitute the law of the State touching the assessment and taxation of shares of bank stock. Under these acts shares of stock in city banks owned by residents of a county are properly taxable in the county.
3. STATUTES—*Constitutionality—Acts 1889-90, p. 111—Code, Section 1040-a—Taxation—Bank Stock.*—The act of February 28, 1890 (Acts 1889-90, p. 111), amended by Acts 1902-3-4, p. 431 (section 1040-a of Code, 1904), providing for the taxation of shares of stock issued by banks located in counties and cities, is not obnoxious to the constitutional provision that "no law shall embrace more than one object, which shall be expressed in its title."
4. BANK STOCK—*Taxation—Uniformity—Constitutional Law.*—The uniformity requirement of section 168 of the Constitution is not affected by the fact that stock in a city bank is taxed by the city against resident holders thereof at a higher rate than it is taxed by an adjacent county against residents of such county, and a statute permitting such difference in rates is not

* Submitted before Judge Prentis took his seat.

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in conflict with said section of the Constitution. The county and city are not "within the same territorial limits of the authority levying the tax."

Error to a judgment of the Circuit Court of the city of Richmond on an application for a mandamus. Judgment for the petitioners. Defendant assigns error.

Affirmed.

The opinion states the case.

H. R. Pollard, for the plaintiff in error.

Hill Montague and *W. W. Beverley,* for the defendants in error.

WHITTLE, J., delivered the opinion of the court.

This is a proceeding by mandamus instituted by the defendants in error, the board of supervisors of Henrico county and various residents therein owning stock in certain banks and trust companies located in the city of Richmond, against the plaintiff in error (the defendant below) to compel him to deduct from the aggregate shares of stock of those institutions the shares owned by the defendants in error who are residents of the county of Henrico, in accordance with the provisions of section 1040-a of Virginia Code, 1904. The object of such stockholders was to prevent their stock from being assessed with city taxes for the year 1916. To an order of the circuit court awarding a peremptory mandamus agreeably to the prayer of the petition this writ of error was granted.

The case lies within narrow limits. The original act on the subject was approved February 28, 1890, under the title: "An act providing for the taxation of shares of stock issued by banks located in counties and cities," section 3 of which prescribes:

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"Whenever any commissioner of the revenue, before closing his assessment rolls or tax lists, shall receive from the cashier of a bank furnishing a list of the holders of bank stock, as required by law for purposes of State taxation, or from the owner of any stock mentioned therein, a certificate of the commissioner of the revenue of the county or city of the State in which the owner of such stock lives, stating that certain shares of the stock mentioned in said list are owned by a resident of that county or city, and that the same have been returned for taxation for that year in such city or county, then the said commissioner of the revenue to whom the said list has been furnished shall deduct from the aggregate value of the shares set forth in said list the aggregate value of the shares mentioned in said certificate." Acts 1889-90, pp. 111, 112.

After the Constitution of 1902 went into effect, the foregoing act, unamended, was re-enacted (Acts 1902-3-4, pp. 431, 432) and now constitutes section 1040-a. The titles of these last two enactments are equally as comprehensive as that of the original act. If, therefore, section 1040-a is still in force, then the order under review, which strictly complies with its terms, is plainly right.

But, to escape that unavoidable conclusion, two assignments of error are pressed upon us:

1. That section 1040-a has by implication been repealed by the act of March 18, 1915; and

2. That, if not so repealed, it is unconstitutional.

We shall address ourselves very briefly to these two propositions in the order stated.

1. It may be observed that the doctrine of repeal by implication is not favored by courts; and it is the settled rule in this jurisdiction that where two acts dealing with the same subject can be harmonized, it is the duty of the court to give effect to both. This principle is too familiar to call for a review of our decisions on the subject; but the

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rule and the reasons upon which it is founded are clearly stated by Burks, J., in *Hogan* v. *Guigon*, 29 Gratt. (70 Va.) 705, 709. We find no such repugnancy between the act of March 18, 1915 (commonly known as the "Bank Act") and section 1040-a as to call for the application of the doctrine of repeal by implication. The "Bank Act" does not in terms refer to section 1040-a, and its title designates by number the sections of the "Tax Bill Act," of April 16, 1903, which are intended to be amended and re-enacted. There is nothing in the title or body of the act even to suggest a legislative purpose, either by amendment or substitution, to repeal section 1040-a. To the contrary, section 19 of the "Bank Act" provides that, "Each bank, banking association, trust and security company, on or before the first day of June in each year, shall pay into the State treasury and to the treasurers of the several counties, cities and towns, respectively, the taxes assessed against its stockholders." This language, it seems to us, is incompatible with a legislative design to destroy the previously provided method for assessing such taxes against stockholders. The two acts are harmonious, and when read together, as they must be, constitute the law of the State touching the assessment and taxation of shares of bank stock.

2. The constitutional objections to the act are: (a) That the title is defective, in that it violates section 15, Art. V, of the former Constitution (sec. 52, Art. IV, of the present Constitution), prescribing that "no law shall embrace more than one object, which shall be expressed in its title." The sufficiency of the title under the latter part of the section is here drawn in question.

The title to the act of March 28, 1890, as we have seen, reads: "An act providing for the taxation of shares of stock issued by banks located in counties and cities." The sufficiency of such title is demonstrated in the able discussion of the subject by Riely, J., in the *Iverson Brown Case*,

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a reference to which on that point should suffice. That case also holds that, "when an act of assembly has been incorporated in the Code, this act may be amended, re-enacted or repealed by an act which simply refers to the number of its section." *Iverson Brown's Case*, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110. See also, *District Road Board* v. *Spillman*, 117 Va. 201, 84 S. E. 103, and *Commonwealth* v. *C. & O. Ry. Co.*, 118 Va. 261, 87 S. E. 622.

And (b): The last assignment is that section 1040-a violates section 168 of the Constitution, which requires that, "All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The argument in support of this contention is that the uniformity requirement can only be maintained by fixing the location of the bank as the situs for taxation. We do not concede either the correctness of that interpretation of section 168, or the deduction drawn therefrom. It is provided by the act of March 18, 1915, that neither counties nor cities shall levy a tax for local purposes on bank stock in excess of $1.15 on every $100 of the assessed valuation thereof. Yet, subject only to that maximum limitation, we find no specific constitutional requirement that the tax rate on bank stock in the city of Richmond and the county of Henrico shall be the same. The city and county are not within the same "territorial limits of the authority levying the tax," in the sense of section 168, and, therefore, the uniformity provision is not applicable. *Day* v. *Roberts*, 101 Va. 248(43 S. E. 362; *Moss* v. *County of Tazewell*, 112 Va. 878, 72 S. E. 945.

For these reasons the order of the circuit court must be affirmed.

Affirmed.

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Syllabus.

Richmond.

BAKER AND OTHERS v. LYNCHBURG NATIONAL BANK AND OTHERS.

(No. 1).

HENRY SILVERTHORN JEWELRY CO. v. LYNCHBURG NATIONAL BANK.

(No. 2).

January 11, 1917.

1. USURY—*Bonus For Loan.*—Plaintiff bank discounted a note of one of defendants for $6,730, endorsed by three other of defendants, upon condition that in addition to the legal rate of interest thereon the bank should be paid a debt of an insolvent concern to it, the assets of which concern defendant wanted to raise money by this loan to buy, but for which debt neither he nor any of defendants were in any way liable prior to the making of such condition by the bank. This debt of such insolvent concern proved to be $930.11, and was accordingly paid to the bank by defendants. Defendants paid only the legal rate of interest or discount on the face of the $6,730 note and on all renewal notes for portions of this debt, but the agreement and payment of the $930.11 bonus made the charge of the bank of interest on said loan evidenced by the note for $6,730 at a rate greater than that allowed by law and hence such $6,730 note was usurious.
2. USURY—*National Banks—Limitation of Actions.*—In an action instituted by a bank on an obligation which is usurious under 5198, U. S. Revised Statutes, there is no limitation of time within which the defense, given by the statute, may be made by the debtor. If he pleads and proves that the debt agreed to be paid is usurious, all interest on such debt, legal as well as illegal, is forfeited, and there can be no judgment rendered except for the principal only.
3. PAYMENT—*Reservation of Discount.*—The reserving of a dis-

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count by a bank is not a payment by the debtor of interest on the loan.

4. PAYMENT—*Application of Payment.*—The settled rule is that the debtor may apply the payments when made. If he fails to exercise this right, the creditor may make the application, and if it is made by neither the debtor nor creditor, the duty then, and not otherwise, devolves upon the court when the question comes before it. Accordingly, where in the case at bar the debtor made a payment of $730 when the $6,730 note fell due, not specifying how this payment was to be applied, and the bank applied $140.20 to the payment of discount reserved by it and the balance to the principal of such note, said item of $140.20 was not embraced in the renewal notes.

5. USURY—*National Bank—Remedy for Illegal Interest Paid or Reserved.*—Usurious interest paid to a national bank cannot be deducted from, or—what is the same thing—applied to the principal of the debt in an action by the creditor against the debtor; the remedy for recovery of usurious interest actually paid being an action under section 5198, Rev. Stats., U. S., to recover the penalty provided for thereby, and only that action, such remedy being made an exclusive remedy by such statute. And in the instant case $930.11 was really a payment to the bank and not a shift or device to conceal a reservation of that sum by the bank out of the original loan. Therefore, it being in fact a payment of interest at a rate greater than that allowed by law, it was not carried with or promised to be paid by the renewal obligations.

6. USURY—*Limitation of Actions—Section 5198 of United States Revised Statutes.*—In actions by the debtor under section 5198 of United States Revised Statutes, to recover the penalty of double the interest paid for which it provides a remedy, the two-year period of limitation begins to run from each actual payment of usurious interest; each such payment is "the usurious transaction" referred to in that part of the statute which gives such remedy; and the statute runs upon each separate payment of such interest, so that no penalty for any payment of interest made more than two years next before the commencement of the action can be recovered under the statute.

7. USURY—*Section 5198 of United States Revised Statutes—Amount of Recovery.*—In case of such payment of interest as is a "usurious transaction" under the statute, i. e., where the payment is at a rate greater than allowed by law—double the whole amount paid, legal as well as illegal interest, may be recovered.

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8. USURY—*Action For Penalty Under Section 5198 of United States Revised Statutes.*—In an action by one of the defendants against the bank to recover from it the penalty provided by section 5198 of the U. S. Rev. Stats., of double the amount of interest at the legal rate paid by it to such bank on renewal notes covering portions of the $6,730 debt, within two years next preceding the institution of the action.

   Held: That the payments of interest at the legal rate on the face of the renewal notes were not usurious transactions.

9. USURY—*Interpretation of Statutes.*—In the interpretation of statutes on the subject of recovery back of usurious interest, or of the recovery of a penalty for such payments, in fact made, the common law rule in favor of letting stand undisturbed payments of the principal actually lent and of legal interest actually made—and even payments of usury where not sued for within the period of the general statute of limitations applicable to actions of assumpsit—will not be held to be changed, except to the extent that the provisions of the statute law plainly make the change.

10. USURY—*Limitation of Actions—Section 5198 of United States Revised Statutes.*—The period of limitation upon the time within which suit must be brought to recover the penalty under section 5198 of U. S. Rev. Stats., begins to run from the date of each payment of interest and not from the payment of the whole debt.

Error to a judgment of the Corporation Court of Lynchburg in an action of debt. Judgment for the plaintiff. Defendant assigns error. Case No. 1.

Error to a judgment of the Corporation Court of Lynchburg in an action of debt. Judgment for the defendant. Plaintiff assigns error. Case No. 2.

Affirmed.

The opinion states the case.

Amonette & Bailey and *R. C. Blackford,* for the plaintiffs in error.

Wilson & Manson, for the defendants in error.

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SIMS, J., delivered the opinion of the court.

These two actions at law were heard together in the court below; a jury was waived and all questions of law and fact were submitted to such court for decision.

The case above designated as No. 1 was an action of debt instituted by the Lynchburg National Bank—hereinafter referred to as "bank"—against the appellants—hereinafter referred to as "defendants"—to recover $1,984.17, balance due of principal and certain interest thereon agreed to be paid by three negotiable notes sued on, and $1.74, protest charges on one of such notes.

Defendants filed a plea of usury.

The usury proved was this: On March 29, 1911, the bank discounted a note of E. M. Baker, one of defendants, at four months, for $6,730, endorsed by three other of defendants, upon condition that in addition to the legal rate of interest thereon the bank should be paid a debt of an insolvent concern to it, the assets of which concern Baker wanted to raise money by this loan to buy, but for which debt neither E. M. Baker nor any of defendants were in any way liable prior to the making of such condition by the bank. E. M. Baker and certain of the defendants thereupon, and subsequently the remainder of the defendants afterwards coming into the transaction in privity with said Baker, agreed to such condition. This debt of such insolvent concern proved to be $930.11, and was accordingly paid to the bank by defendants on May 3, 1911.

Defendants paid only the legal rate of interest or discount on the face of the $6,730 note and on all renewal notes for portions of this debt, but said agreement and payment of the $930.11 bonus made the charge of the bank of interest on said loan evidenced by the note for $6,730 at a rate greater than that allowed by law and hence made such $6,730 note usurious.

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Two of the notes sued on were for $2,000 each, subject to certain credits of payments of principal. Such payments amounted to $2,000 on one of such notes—paying the principal in full, but leaving unpaid interest thereon from its due date, March 25, 1914; and to $515.03 on the other of such notes, leaving unpaid $1,484.97 principal and interest on $2,000 from its due date, February 22, 1914. These two notes had their origin in said $6,730 note. The latter was reduced to the amount evidenced by these notes by certain payments from time to time.

The remaining note sued on was for $500, and was not affected by the usurious transaction mentioned.

Hence, by the notes sued on there was agreed to be paid $1,484.97, principal of, and certain unpaid interest on, said usurious debt and $500 of principal of a different debt, unaffected by the uruary, making $1,984.97 of principal and protest charges of $1.74 on the $500 note.

Reference to the fact that another separate note was on March 29, 1911, given to the bank for part of the $930.11 is omitted as an immaterial circumstance.

With respect to the payments which had been made on said $6,730 note, the following only need be here said: At the time the bank discounted such note, on March 29, 1911, it retained the discount of $140.20 on it, which was at the legal rate on its face, and paid over or placed to the credit of E. M Baker (which was the same thing in effect) only $6,589.80. When the $6,730 note first fell due, July 31, 1911, $730 was paid to the bank on account of this note—not specifically applied by defendants to discount and principal, but which the bank applied as follows: $140.20 to the payment of said discount reserved by it as aforesaid, included in the face of and agreed to be paid by the note; and $589.80 to the principal of such note, reducing it to the principal amount of $6,000. All subsequent payments made of interest and principal were specifically paid

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by defendants to be applied—and hence were applied by defendants—just as they were applied by the bank.

The court below entered judgment in case No. 1 for the plaintiff for the sum of $1,986.71, with interest on $1,984.97, part thereof, from December 20, until paid.

This action of the court below is complained of and made the basis of two assignments of error before us, which are in effect that in addition to the forfeiture of all interest *agreed to be paid* by said two notes sued on which were affected by their usurious origin, there should have been deducted from the amount sued for—

1. The said $140.20 discount retained or reserved by the bank on said original loan, and

2. The further deduction of said $930.11 bonus, paid as aforesaid, with interest thereon.

The case designated as No. 2 above, was an action of debt instituted on December 22, 1914, by the appellant—one of the appellants in case No. 1—hereinafter referred to as the jewelry company—against said bank, to recover from it the penalty provided by section 5198 of the United States statutes of double the amount of interest paid by the jewelry company to such bank on renewal notes covering portions of said $6,730 debt, within two years next preceding the institution of such action,—being payment to said bank of discount on three renewal notes of defendants (said two $2,000 notes and a $1,000 note), unpaid within such two year period, on which such instalments of discount were demanded by the bank and paid by the jewelry company when such renewal notes were from time to time accepted by the bank.

None of these payments included a greater rate of interest than one-half of one per cent. for thirty days on the face of such renewal notes. This rate the bank had the legal right to charge and receive in advance under section 5197 United States Revenue Statutes.

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As above stated, all of these payments were specifically paid by the jewelry company to be applied, and they were applied by the bank, to the discharge of the instalments of discount which were paid as aforesaid. These payments within said two year period aggregated $324.38, and the penalty sued for was $648.76.

Question was raised by the bank in this action as to the right of the appellant to maintain the action; but the lower court refrained from passing on it and decided the case against the appellant on its merits. It is unnecessary for us, therefore, to pass on such question as our conclusion is the same on the merits of the case.

The judgment of the court below in this case No. 2 dismissed the action of the jewelry company with costs against it. This action of such court is complained of and made the basis of one assignment of error, which is the third assignment of error we have to consider, namely:

3. That the trial court erred because it did not enter judgment in favor of appellant in case No. 2 for twice the amount of interest paid to the bank within two years prior to the institution of such action.

We will consider the assignments of error in the order stated above—first the two in case No. 1 and lastly that in case No. 2.

Both of these cases are governed and depend for their right decision upon the proper construction of said section 5198 of U. S. Rev. Statutes. This statute is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature

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of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in such cases."

As will be observed, this statute has to do with two classes of cases:

First. Where there is an action instituted by the bank on an obligation which is usurious—in which case the bank must forfeit *the entire interest* agreed to be paid by the obligation but not in fact paid, and can recover only the principal of the debt agreed to be paid by the obligation sued on.

Second. Where there is an action by the borrower to recover the penalty provided by the statute of double the amount of a greater rate of interest than allowed by law which has been in fact paid—in which case the action must be commenced within two years "from the time of the usurious transaction."

Case No. 1 is of the first class; Case No. 2 is of the second class.

In the former case there is no limitation of time within which the defense, given by the statute, may be made by the debtor when sued by the bank. If he pleads and proves that the debt agreed to be paid is usurious, all interest on such debt, legal as well as illegal, is forfeited, and there can be no judgment rendered except for the principal only sued for.

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So far there is no controversy between counsel for appellants and appellees as to the proper construction of this statute.

Coming now to the consideration of the first assignment of error, namely:

1. That the said $140.20 discount retained or reserved by the bank on said original loan should have been deducted from the said amount of $1,484.97 agreed to be paid, which is sued for in case No. 1.

It is true, as counsel for appellants contend, that the reserving of this discount by the bank was not a payment of it. *McCarthy* v. *First Nat'l Bank*, 223 U. S. 493, 32 S. Ct. 240, 56 L. Ed. 323. This $140.20 was, therefore, embraced in the original $6,730 note. Counsel contend that it continued to be embraced in the succeeding renewal notes and was embraced in the two $2,000 notes sued on. This depends upon the application of the payment of $730 which was made July 31, 1911. As we have seen above this payment stands alone as the single payment which was not specifically applied by the debtor making it. It was merely a general payment on the debt. The bank applied $140.20 of it to the payment and discharge of such item of discount. If that was a legal application, such item was not thereafter embraced in succeeding renewal notes nor in the two $2,000 notes sued on. Counsel for appellants claim that the creditor cannot make such an application in such case without the assent of the debtor, and that the court will apply the payment to the principal of the debt, and cite the cases of *Danforth* v. *Nat'l State Bank of Elizabeth* (C. C. A. 3d Cir.) 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622 and *Citizens Nat'l Bank* v. *Gentry*, 111 Ky. 206, 62 S. W. 454, 757, 56 L. R. A. 673, which sustain this position according to the rule in those jurisdictions. However, aside from the assent of the debtors to the application of the payments in question, evidenced in the instant case by their

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acquiescence therein for over three years before these suits, the prevailing rule is different. As said by Judge Keith, in delivering the opinion of this court in *Munford* v. *McVeigh*, 92 Va. at pp. 462-3, 23 S. E. 857, 863, in reference to this question of payments on an usurious debt:

"The settled rule upon this subject is that the debtor may apply the payments when made. If he fails to exercise this right, the *creditor may make the application*, and if it is made by neither the debtor nor creditor, the duty then, and not otherwise, devolves upon the court when the question comes before it." (Italics supplied).

Therefore, the bank had the right to make the application it did of said $730 payment, which paid off said item of $140.20 on May 3, 1911, so that it is not embraced in said two $2,000 notes sued on. Hence there is no merit in the first assignment of error.

We come now to the second assignment of error, namely:

2. That the further deduction of said $930.11 bonus paid as aforesaid, with interest thereon, should have been made from said amount of $1,484.97 agreed to be paid, which is sued for in case No. 1.

Counsel for appellants contend that this bonus should be deducted from the principal of the money actually loaned by the bank, claiming that it cannot be considered as illegal interest *paid*, but must be considered as money *reserved* by the bank on the original loan. They admit that if it was money *paid to* and *not reserved by* the bank, it would be properly regarded as illegal interest paid, *i. e.*, as "a rate of interest," which said section 5198 condemns, and that their contention cannot be maintained, because they further admit that it is well settled by decisions of the Supreme Court of the United States that usurious interest paid cannot be deducted from, or—what is the same thing—applied to the principal of the debt; the remedy for recovery of usurious interest actually paid being an action

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under said section 5198 to recover the penalty provided for thereby, and only that action, such remedy being made an exclusive remedy by such statute. *Barnett* v. *Nat'l Bank,* 98 U. S. 555, 25 L. Ed. 212; *Brown* v. *Marion Nat'l Bank,* 169 U. S. 416, 18 S. Ct. 390, 42 L. Ed. 801; *Dresbach* v. *Nat'l Bank,* 104 U. S. 52, 26 L. Ed. 858; *Hazeltine* v. *Bank,* 183 U. S. 134, 22 S. Ct. 50, 46 L. Ed. 118.

It is true that if this transaction was in fact a reservation by the bank of the $930.11, and the device of making it appear as a separate payment to the creditor as a bonus, was only a shift to disguise the real transaction, the court would deal with the real transaction; in which case the $930.11 would be in effect discount reserved by the bank, just as the item of $140.20 above mentioned was discount reserved by the bank, and the $930.11 would have been carried with the $6,730 note or promised to be paid thereby; and since such $930.11 was not subsequently paid off, as the $140.20 item was, the position of counsel for appellants would be correct, that this $930.11 would be still carried with the said renewal notes sued on and promised to be paid thereby, (*Scurry* v. *Freeman,* 2 Bos. & Pul. [Eng. Reprint] 381, cited and relied on by counsel for appellants), and could not be recovered in the action by the bank on such notes, but should be deducted from the face of such notes.

The issue is one of fact. No particular importance is to be attached to any single circumstance attending the transaction, such as that the $930.11 was not paid until May 3, 1911, over a month after the original loan, nor any other matters of mere form, because the shifts and devices by which the real nature of such transactions may be sought to be concealed are innumerable. But without recounting in detail the actual circumstances of the transaction in the instant case, it is deemed sufficient to say that it is clear from the whole of it that the $930.11 was really a payment

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to the bank and not a shift or device to conceal a reservation of that sum by the bank out of the original loan. Indeed, it is not even contended by counsel for appellants that it was not a payment in fact, but the court is asked to arrive at the fact that it was not, by construction, on the theory that such a shift or device was possible. The answer to this is that, while it is true that the court will be alert to look beneath the surface for the true nature of the transaction, it will not by any constructive reasoning assume that a different state of facts exists from that affirmatively shown to exist by the proof in the case. In *Scurry* v. *Freeman, supra,* the pretended payment was plainly in fact a reservation by the lender of the bonus in excess of the legal interest and not in truth a payment of it.

Therefore, the $930.11 being in fact a payment in the instant case of interest at a rate greater than that allowed by law, it was not carried with or promised to be paid by the obligations in question sued on, and hence could not be set off or deducted from the said amount agreed to be paid by such obligations.

Therefore, we cannot sustain the second assignment of error.

We take up now the third and only remaining assignment of error, which is as follows:

3. That the trial court erred because it did not enter judgment in favor of appellant in case No. 2 for twice the amount of interest paid to the bank within the two years prior to the institution of such action.

It will be remembered from the above statement of facts that all of the interest paid in the instant case within said two years was in the shape of discount on the notes affected by the usury, renewed within this period, and all of it was at the legal rate, computing same on the face of such notes.

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It is now well settled that in actions by the debtor under this statute to recover the penalty of double the interest paid for which it provides a remedy, the said two year period of limitation begins to run from each actual payment of usurious interest; that each such payment is "the usurious transaction" referred to in that part of the statute which gives such remedy; and that the statute runs upon each separate payment of such interest, so that no penalty for any payment of it made more than two years next before the commencement of the action can be recovered under such statute. *McCarthy* v. *First Nat'l Bank*, 223 U. S. 493, 32 S. Ct. 240, 56 L. Ed. 523.

It should be noted, however, that all the payments of interest involved in the case last cited were payments at a greater rate than was allowed by law on the face of the obligation; so that the precise point involved in the instant case, namely, whether interest paid at the legal rate on the face of the obligation was usurious, was not involved in that case.

Under the rule estabished by the *McCarthy* v. *First Nat'l Bank* case the recovery of any penalty for the payment of the $930.11 bonus on May 3, 1911, if that were sued for, was barred. It is not sued for, however, but the payments within said two years of interest or discount, at the legal rate on the face of the renewal notes in question are sued for.

This raises the interesting and, it seems, novel question, with respect to the construction of said federal statute, section 5198, whether such interest is "the greater rate of interest" than allowed by law—*i. e.*, usurious interest payments—for which such United States statute provides the remedy of recovery of "twice the amount of the interest thus paid."

Was each of such payments a "usurious transaction?"

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It is true that it is also well settled that in case of such payment of interest as is a "usurious transaction" under such statute, *i. e.*, where the payment is at a rate greater than allowed by law—double the whole amount paid, legal as well as illegal interest, may be recovered. *First Nat'l Bk.* v. *Watt*, 184 U. S. 151, 22 S. Ct. 457, 46 L. Ed. 425. But it is also true by the very terms of the statute, that the payments themselves, the statutory penalty for which the action is brought in the instant case, must each have been respectively a "usurious transaction," else the statute does not provide a remedy for their recovery. Hence, the question remains, were the payments of interest at the legal rate on the face of the obligations in the instant case, respectively, usurious transactions.

The rule set forth in Webb on Usury, section 308, is urged upon us, which is as follows: "If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however, remote, can be free of the taint if the descent can be fairly traced."

Under this rule, the principal as well as all interest on the notes sued on would be forfeited.

An examination has been made of the numerous decisions cited by the author to support the text quoted. They are without exception, where at all in point, cases of suits on the obligation by the holder of it against the debtor, where the aid of the court is sought to enforce an obligation to pay money agreed to be paid but not in fact paid; not of a debtor asking the aid of the court to disturb a transaction which is closed by his own act and to recover back what he has in fact paid.

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The rule quoted from Webb on Usury, and of the cases which support it, is based on the fact that the usury statutes of the jurisdiction of such cases, which controlled their decision, made the usurious obligation absolutely void. When a suit is on a void obligation, there is no halfway ground that the court can take of allowing recovery of what *ex aequo et bono* should be recovered. The whole recovery must be denied because there is no obligation on which any recovery can be based. It is true the federal statute (sec. 5198) has this same effect to the extent of "the entire interest" in case of a suit by a national bank on a usurious obligation, and on all renewals of it, as is now well settled; but this is because of the express enactment of the statute that the "entire interest" which the obligation carries with it, or which is *"agreed to be paid,"* on the obligation, shall be forfeited. (Italics supplied). *Brown* v. *Marion Nat. Bk.*, 169 U. S. 416, 18 S. Ct. 390, 42 L. Ed. 801, and numerous other cases cited in note 5 Ed. Stat. Anno., p. 135.

With respect to suits to recover on obligations tainted with usury, therefore, to the extent that the obligation to pay any interest is void, the text quoted from Webb on Usury, and the said federal statute, rest upon the same principle, namely, that there can be no recovery upon a void obligation.

But with respect to suits by the debtor to recover the penalty provided by the statute, there is no enactment that double the "entire interest" *paid* can be recovered. In suits of the latter class, the statute itself gives the right of action and a wholly different principle is involved.

As said in the case of *Lynch* v. *Merchants National Bank*, 22 W. Va. 554, 46 Am. Rep., at p. 525, cited by counsel for appellants, where such case refers to some of the cases of suits on the usurious obligation, or on renewals of it, which construe the federal statute with respect to such

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suits, as above noted: "But all the cases relied on by plaintiff in error were actions or suits by the bank to recover the loan from the borrower * * * None of them were actions by the borrower against the bank to recover the penalty for taking illegal interest, and therefore they are not authority upon the question in the case at bar, which is an action by the borrower against the bank to recover such penalty."

There are other reasons than those above mentioned, why the lines of authorities applicable to suits on usurious obligations have no application to suits to recover back interest after it has been in fact paid, or the penalty provided by statute for payment of usurious interest. Among them the following are important: The former suits concern executory contracts, which the court is asked in effect to enforce; the latter executed contracts, which the court is asked, in effect, to set aside and compel one of the parties thereto to part with what has been paid to him by the very person asking the court to undo what he himself has done.

At common law, an action of *assumpsit* would lie by the borrower to recover back interest paid at a greater rate than that allowed by the usury statutes; although no action whatever would lie by the lender to recover anything on the usurious obligation. But in such an action at common law by the borrower he could recover only the excess over the legal rate of interest paid; (Tyler on Usury, p. 2124); *Kendall* v. *Davis*, 55 Ark. 318, 18 S. N. 185); and could recover only those payments of such excess of interest as were made within the period of the statute of limitations governing such action. Other payments of excess over legal interest, and payments of principal and all legal interest thereon, after they were in fact made, were allowed to stand, although by action on the usurious obligation the lender could not have enforced any such payments.

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The rule at common law was the same upon a suit in equity by the borrower. (*Munford* v. *McVeigh, supra*).

Similarly, when we come to interpret statutes on the subject of recovery back of usurious interest, or of the recovery of a penalty for such payments, in fact made, the common law rule in favor of letting stand undisturbed payments of the principal actually lent and of legal interest actually made—and even payments of usury where not sued for within the period of the general statute of limitations applicable to actions of *assumpsit*—will not be held to be changed, except to the extent that the provisions of the statute law plainly make the change.

In other words, the inquiry, upon the construction of said federal statute, section 5198, is: What effect does the penalty side of this statute have upon actual payments of interest, or bonus, which have been in fact made by the borrower—not mere fictitious payments which were shifts or devices to conceal the true nature of the transaction, but where the usury was in fact *paid* and not reserved? Does this statute intend to disturb such payments and, by a fiction indulged in, make a different application of them than was in fact made by both the debtor and creditor?

We do not think it so intends.

We have seen from the quotation above from the case of *Munford* v. *McVeigh, supra,* what the settled prevailing rule on this subject is, even in cases of suits by the creditor to enforce the executory usurious obligation to pay the money thereby agreed to be paid. *A fortiori* we would not expect the statute we are considering to intend to disturb such payments in cases of suits to recover the penalty of payment back of double the amount of such payments actually made, further than the terms of the statute plainly so require.

We cannot agree, therefore, with the reasoning of counsel for appellants, in the instant case, that "the same prin-

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ciples govern whether the forfeiture clause or that for the recovery of the penalty is relied on" of said statute 5198. As indicated above, in our view of the subject there is a wide difference between the principles governing in the application of the one side of said federal statute from those governing in the application of the other side of it. We must construe such federal statute in the light of this difference in the principles applicable to the two sides of it.

When its correct meaning is ascertained, that side of said statute allowing recovery of the penalty thereby provided must govern and determine the decision of case No. 2 before us.

As is said in *Barnett* v. *National Bank*, 98 U. S. 558, 25 L. Ed. 212: "The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case. Where the statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers and Mechanics Bank* v. *Dearing*, 91 U. S. 29, 23 L. Ed. 196."

Counsel for appellants have cited no case of an action under section 5198 aforesaid for the penalty provided thereby, where the recovery of interest paid at only the legal rate on the face of the debt was allowed. We have been able to find only one such case. That is the case of *Louisville Trust Co.* v. *Kentucky Nat. Bank* (C. C.), 102 Fed. 442, which, however, does not base its holding upon the idea that such payments were themselves usurious or constituted respectively an "usurious transaction;" but upon the authority of *McBroom* v. *Scottish Investment Co.*, 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729. The latter case did not arise under said Federal statute but under the usury statute of the Territory of New Mexico. In it Mr. Justice Harlan, delivering the opinion of the court, held that the period of limitation upon the time within which suit must be brought to recover back payments of usurious interest did not begin

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that 500 pounds were formally paid over by the lender to the borrower, but the latter immediately handed back fifty pounds of it to the son of the lender at the request of the latter and executed his obligation later to the lender for five hundred pounds and interest thereon at the legal rate of five per cent. per annum. This was, in effect, fifty pounds *reserved* by the lender as discount on the loan, and the device or shift referred to did not conceal the true nature of the transaction. Hence, the obligation in question carried with it or promised to pay (under a like rule as that established in *McCarthy* v. *First National Bank*, *supra*) the fifty pounds discount, and it was held that every payment of the interest was at a rate greater than allowed by law or was a payment of usury, although at the legal rate on the face of the obligation. This was so because the interest paid included interest on the fifty pounds which was *never paid* in that case, but only reserved by the lender and promised to be paid by the borrower. The report of this case does not give the statute under which it arose nor show for what amount the action was brought; but it was an action *qui tam* and evidently for the recovery of the penalty provided by the English usury statute, possibly 12 Ann. C. 16 (4 Stat. at Large, p. 247), or a similar statute. If it be assumed that the legal principle involved was the same as that which arises under the said federal statute in the instant case—which seems likely to be true—still, as noted above in considering the assignment of error with respect to said $930.11 bonus payment in case No. 1 before us, the instant case is different from that of *Scurry* v. *Freeman*, in that it differs in its facts, For the reasons stated above in connection with said assignment of error, the $930.11 was not reserved in the instant case by the borrower—was not carried with the usurious obligations sued on or promised to be paid thereby, so that the interest payments sued for did not include in-

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terest on the $930.11. Therefore, the interest payments sued for in the instant case were not on the $930.11 *paid*, as they were on the fifty pounds *reserved* in the *Scurry* v. *Freeman* case, and hence the latter case is not in point.

The other case cited of an action by the debtor against the creditor is that of *Oyster* v. *Longnecker*, 16 Pa. St. 269. This also was a *qui tam* action to recover the penalty provided by the Pennsylvania usury statute enacted March 2, 1723, which is given in the report of the case. The penalty provided by this statute for the taking, or receiving, of usury was the forfeiture of the whole debt, the provision as to this being that "upon conviction thereof, the person or persons so offending shall forfeit the money or other things lent, one-half thereof to the Governor for the support of the government and the other half to the person who shall sue for same by action of debt," etc. The statutory period of limitation on such suit for the penalty, provided by another and general statute of limitations, was one year from the commission of the offense of taking or receiving a payment of usury. The facts in the case were that $700 were formally paid over by the lender to the borrower, but the latter immediately handed back to the former $35 and executed his obligation for the $700. There was but one payment made on this debt, which was of the whole $700 and interest on the face of it at the legal rate; and this whole payment was made within one year next before the action was instituted. The court held that the $35 bonus was in effect discount reserved, which was carried with and promised to be paid by the obligation, but not in fact paid at the time of the original transaction; that it was not paid until the payment of the $700 and interest thereon was made by the debtor, which was within the statutory period of limitation, and as such payment then included interest on the $35.00 discount reserved, the interest paid was at a rate greater than allowed by law, was a

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sideration of the federal statute, section 5198, on the penalty side of it.

Hence, we conclude, upon these authorities and upon the principles and authorities referred to above, that there is no merit in the third and last assignment of error.

We are, therefore, of opinion, for reasons stated above, that there is no error in either of the judgments complained of and they will be affirmed.

Affirmed.

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Richmond.

BROWN v. FORD AND OTHERS.

January 11, 1917.

Absent, Prentis, J.*

1. TRUSTS.—*Jurisdiction—Liens.*—Where a court of equity in three chancery causes has taken the management and control of the whole corpus of a trust estate and in a fourth cause has taken jurisdiction to partition and distribute the realty and personalty of the estate, the court has unquestionable primary jurisdiction as a court of equity of a claim against one of the beneficiaries to the extent that such claim is an equitable lien on his interest in the estate under the control of the court.
2. TRUSTS.—*Creation of Equitable Lien.*—An executory agreement on the part of a beneficiary to make the whole corpus of a trust estate a security for a debt, operates to create an equitable lien on the beneficiary's interest in such estate. That the interest of the beneficiary is not vested but contingent is immaterial; when the contingent interest becomes vested the equitable lien attaches.
3. EQUITABLE LIENS.—*Creation.*—Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described and identified, a security for a debt or other obligation, creates an equitable lien upon the property so indicated, which is enforceable against the property. Under like circumstances a mere verbal agreement may create a similar lien upon personal property. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, enforced upon the principle that equity will treat that as done which, by agreement, is to be done.
4. EQUITABLE LIENS.—*After-Acquired Property.*—An equitable lien upon property, to be acquired in the future, is valid and enforceable.
5. TRUSTS.—*Jurisdiction.*—A portion of a contingent interest of a beneficiary of a trust estate, upon his death before the death

* Submitted before Judge Prentis took his seat.

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"1. In entering the decree aforesaid, dismissing the petition of your petitioner on the above-mentioned exception to the commissioner's report.

"2. In not entering a decree overruling the exceptions thereto and directing payment of the amounts found to be due to your petitioner by the parties above mentioned and in default of their so doing directing their payment out of the funds in its charge."

The reports of Commissioner Sheild were made under the following decrees of reference entered in said four causes:

The first of such reports was made under decree of reference entered on February 1, 1912, the substance of which was as follows:

"It appearing to the court that the interest of Mary Lee Benet and Charles Thompson Herndon, in the Ford trust estate are encumbered of record, it is adjudged, ordered and decreed that these causes be referred to one of the commissioners in chancery of this court, who will as soon as possible report to the court the lien debts due by said Mary Lee Benet and Charles Thompson Herndon, or against their interests in the Ford trust estate, in order of their dignity and priority, respectively, and the parties primarily liable, together with any other matters deemed pertinent by the commissioner, or required to be specifically stated by the parties, or any of them. * * *"

The second of such reports was made under decree of reference entered on June 2, 1913, which so far as it related to the claim of appellant recommitted said first report with direction to further inquire and report:

"1. Whether the debt asserted by said J. Henry Brown in his petition filed herein is payable by any party to this cause, and if so, by whom and the amount so payable?"

"2. Whether the said claim or any part thereof is pay-

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able out of any of the funds under the control of this court in this cause, and, if so, what?"

In his second report, which is a very able and exhaustive one and by which the court is greatly assisted in its consideration of this case, Commissioner Sheild reported, in effect, that appellant had an equitable lien on certain interests in or portions of the said "Ford trust estate," as follows:

Item 1. On the interests of Stewart H. Ford, Charles Thompson Herndon and Mrs. Mary Lee Benet in such estate for the amount of $1,283.50 under the first contract made with appellant hereinafter more particularly referred to.

Item 2. On the interests of Stewart H. Ford and Mrs. Benet in such estate for the amount of $1,004.00 under the second contract made with appellant hereinafter more particularly referred to.

Item 3. That as to the other items of his debt, amounting to $291.50, appellant had no lien on any portion of said estate, but that Stewart H. Ford and Mrs. Benet were personally liable to him therefor.

The exceptions to said report by Stewart H. Ford and Charles Thompson Herndon, above referred to, were as follows:

"1. That said commissioner erred in reporting that a court of equity has, or ever had, jurisdiction of the claim asserted by the petitioner, J. Henry Brown, and should have reported that a court of equity is without jurisdiction of said claim.

"2. Said commissioner erred in holding that the pleadings are broad enough to include a claim for personal liability against S. H. Ford, when he should have reported that a claim for such personal liability was not within the pleadings.

"3. Said commissioner erred in holding that there was or is any personal liability on either of the Ford children for

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mentioned in connection with reference to Commissioner Sheild's second report.

The interests of the Ford children in said estate was then contingent, as aforesaid, and not vested.

2. An express executory agreement made, before the material was furnished or work was commenced contracted for thereby, in 1908, between appellant, on the one part, and Stewart H. Ford and Mrs. Benet, on the other part, (B. W. Ford having meanwhile died) to make the corpus of said estate a security for "Item 2" of $1,004.00, above mentioned.

The interests of one-fourth each of three of said Ford children, to-wit: Stewart H. Ford, Mrs. Benet and Mrs. Florence B. Quincey in said estate, being then vested, they having survived their said mother, who died in 1908 prior to this second contract with appellant—of the interest of one-fourth in said estate which would have belonged to B. W. Ford had he survived his mother, a portion was in 1910 vested in Charles Thompson Herndon under a compromise agreement by the terms of which the latter took such portion of such interest in the estate, by *his "consent"* and the consent of the other parties to such agreement, *"charged"* with the payment of "the debts and liabilities of" said B. W. Ford; and by like *consent* there was embodied in a decree of said chancery court, entered April 10, 1910, in the above-mentioned four causes, the following provisions, among others, to-wit: "and the court will hereafter by proper decrees make provision for the settlement with or satisfaction of any other creditors of B. Wellford Ford, deceased; if any there be, who shall establish a valid claim against the one-fourth interest in said trust estate involved in this clause of this decree" (being the interest which would have belonged to B. W. Ford had he survived his mother) "other than those specified in this decree out of the amount payable

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to the said Charles Thompson Herndon under this clause of this decree."

3. Express executory agreement made, before the material was furnished or work commenced contracted for thereby, following the agreement last mentioned, between appellant on the one part and Stewart H. Ford and Mrs. Benet on the other part to make the *corpus* of said estate a security for "Item 3" of $291.50 above mentioned.

The petition further alleges that in consideration of and relying upon the aforesaid agreements appellant proceeded to and did furnish the material and do the work thus contracted for in accordance with such agreements. A bill or account rendered by appelant against the "Ford trust estate" covering all of said items was filed with the petition.

The prayer of the petition contains the following:

"* * * that petitioner may be paid the full amount of his bill with interest for work done and material furnished as herein shown; that an order may be entered herein establishing and fixing his said debt and interest as a debt and lien against the Ford trust estate and all the property involved and described in these causes * * * and that such other relief may be granted to petitioner as may be right and proper and as the nature of his case may require."

There was proper personal service of process to answer the petition upon Stewart H. Ford and said Herndon, and also upon the executor of Mrs. Florence B. Quincey and upon her son, Clarence E. Quincey, Jr. They did not demur, plead to or answer the petition. It was taken for confessed as to them.

The appellant, however, not relying upon this condition of the pleadings, introduced evidence before the commissioner; and there was rebuttal evidence introduced in behalf of said exceptants, Stewart H. Ford and said Herndon.

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As to the allegations of the petition stated in paragraphs 1, 2 and 3 next above, however, there is no conflict in the evidence and such allegations are sustained by the proof, in addition to being taken for confessed as aforesaid. It is true that the testimony of appellant is not express that there was an agreement by Stewart H. Ford and Mrs. Benet to make the *corpus* of the said estate a security for "Item 3" of $291.50 above mentioned; but he testifies that this work was contracted to be done as additions to the work under contracts covering "Item 1" and "Item 2;" and his testimony stresses the fact that there were personal obligations in writing by Stewart H. Ford and Mrs. Benet for $200.00 of such $291.50 item; and Commissioner Sheild reported, as above stated, that there was no lien for such $291.50 item, but only the personal obligations of the two last-named parties therefor; the testimony of Stewart H. Ford, however, examined as a witness for appellant when he gave his first deposition, is to the effect that the allegations of the petition stated in paragraph 3, as well as in paragraphs 1 and 2 next above, are correct. He testified that he had gone over the entire account of appellant filed with the bill, that all the work was properly done, the charges therefor correct, and that appellant had been employed to furnish the material and do the work with the intention to make the Ford estate security and liable therefor. And it seems to us from the whole proof clear that all of the work done and material furnished by appellant was for "the Ford estate," and that there were express executory agreements by Stewart H. Ford, B. W. Ford and Mrs. Benet by the first contract, and Stewart H. Ford and Mrs. Benet by the subsequent contracts, to make the corpus of such estate a security for the payment of all of it, this being the primary intention of all the contracting parties.

The proof fails to sustain the allegations of the petition

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that Mrs. Quincey authorized her interest in the Ford estate to be bound for any of debt to appellant.

The only contention of Stewart H. Ford in his depositions given in the case contrary to the claims of appellant is that the former denies ever having made any express promise to be personally bound for "Items 1" and "2" above referred to, of appellant's debt; claiming that his agreements were confined to the undertaking that appellant should have a lien on the Ford estate therefor. The petition, in addition to the allegations above summarized also contained the allegations of such express personal promise on the part of Stewart H. Ford, and also of Mrs. Benet and of B. W. Ford as to "Item 1" aforesaid; but reference thereto is left out of consideration, as is also the fact that appellant testifies that such personal promises were made, and the conflict thereby produced between the testimony of appellant and Stewart H. Ford on this point is also left out of consideration because, in the view we take of this case, hereinafter more particularly set forth, whether such express personal promise existed or not is immaterial.

It will be observed that appellant's petition was not filed in said causes until November 14, 1910, and the decree complained of was not entered until July 2, 1915, long after said contracts or agreements with appellant were made. It seems that prior to the entry of such decree, just as of what date the record does not show, and after the death of Mrs. Ford in 1908, as it would seem, although this does not clearly appear from the record, Mrs. Florence B. Quincey received and withdrew from said suits her entire one-fourth interest in said estate, and Mrs. Benet or her lien creditors did the same as to her one-fourth interest, thus leaving no part of their one-half of said estate under the control of the court upon which any lien in favor of appellant could be enforced. The evidence, however, is clear that the delay

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in bringing the said agreements with appellant to the attention of the court below was not the fault of appellant but of the said parties who made such agreement with him, who expressly undertook, in effect, to bring those matters to the attention of the court and obtain such action of the court as might be necessary to perfect the lien in favor of appellant aforesaid agreed to be made as aforesaid. It is also clear from the evidence that if said parties had lived up to their agreements with appellant a lien would have been fixed and established on the whole corpus of said estate, certainly when the interests in remainder therein became vested on the death of Mrs. Ford in 1908.

It seems that there are funds still under the control of the court below belonging to Stewart H. Ford from his one-fourth interest in said estate, and to said Herndon, upon which such portion of any lien in favor of appellant as may be held as having attached thereto could be enforced and out of which any lien thereon created by any personal decree against the two latter parties may be enforced.

In this situation of the pleadings, proof and funds under the control of the court below, the following questions arise for our determination, which will be considered in the order stated below, with supplementary statements of fact shown by the record especially applicable thereto:

First. Did the court of equity below have jurisdiction of the claim of J. Henry Brown asserted by his said petition?

We are of opinion that such court did have such jurisdiction.

The court had, in the three chancery causes first above named, taken jurisdiction of the management and control of the whole corpus of said estate, and in the last named or fourth of such causes had taken jurisdiction to partition the real estate and distribute the personalty of "the Ford estate."

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(a) As to Stewart H. Ford such court had unquestionable primary jurisdiction as a court of equity of the claim of appellant against him to the extent that such claim was an equitable lien on his interest in said estate under the control of the court. This position is not controverted by him or his counsel as we understand it.

The case of *Stevens* v. *McCormick,* 90 Va. 735, 19 S. E. 742, cited by counsel for exceptants, does not decide that in a partititon suit a lien creditor may not invoke the jurisdiction of a court of equity by petition therein (which the statute indeed then as now expressly provides may be done), but merely that it was not incumbent on the plaintiffs in a partition suit to make creditors parties.

The express executory agreement aforesaid on the part of Stewart H. Ford to make the whole corpus of the Ford estate a security for the whole debt to appellant operated to create and had the effect that it did create an equitable lien on his one-fourth interest in such estate.

As stated by 2 Pomeroy's Equity (2nd ed.) sec. 1235: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described and identified, security for a debt or other obligation * * * creates an equitable lien upon the property so indicated which is enforceable against the property * * * Under like circumstances a mere verbal agreement may create a similar lien upon personal property."

"Whatever the form of the contract may be, if it is intended thereby to create a security it is an equitable mortgage enforced upon the principle that equity will decree that as done which by agreement is agreed to be done." *Delaney* v. *Willis,* 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815.

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The first contract or agreement with appellant was in writing, the second verbal, the third and fourth in part in writing, and the fifth in part in writing from Mrs. Benet and ratified verbally by Stewart H. Ford. However, no issue is made before us with respect to the Ford estate being real or personal estate, hence we may treat as immaterial, so far as the existence of an equitable lien is concerned, any question of whether the agreements mentioned were verbal or in writing.

That the interest of Stewart H. Ford was not vested, but contingent upon his surviving his mother when the first agreement with the appellant was made, is also immaterial. When the contingent interest became vested upon the death of his mother in 1908, the equitable lien attached thereto in favor of appellant.

As laid down in the same authority last above quoted (3 Pomeroy's Eq., 2d ed.), section 1291: "According to the general doctrine of equity established beyond any doubt by the highest authorities, the * * * equitable lien upon property to be acquired in the future is valid and enforceable * * *"

(b) As to Mrs. Benet and Mrs. Quincey, for the reasons stated above (the petition being taken for confessed as to them also) the appellant had at one time in accordance with the allegations of the petition an equitable lien on their one-half interest in said estate as security for his debt, which was lost by the failure of Stewart H. Ford, B. W. Ford and Mrs. Benet to comply with their first contract with appellant, and by the same breach of their second, third, fourth and fifth contracts with appellant by Stewart H. Ford and Mrs. Benet; so that the court had unquestionable primary jurisdiction as a court of equity of the claim of appellant against Mrs. Benet and Mrs. Quincey in so far as he asserted by his petition an equitable lien against their said interests in said estate.

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(c) As to said Herndon, by his *consent*, as above stated, and in accordance with the decree of court of April 10, 1910, above referred to, the court below had, as a court of equity, unquestionable primary jurisdiction of the claim of appellant asserted in his petition as a debt and liability of B. W. Ford against the fund under the control of the court belonging to said Herndon "charged" with the payment of "the debts and liabilities" of B. W. Ford.

As it follows from what we have said that the decree complained of was erroneous and hence further decree will be necessary, we have to consider and pass upon the following further questions, in their order as stated below, namely:

Second. The court below having jurisdiction of the case in the exercise of its primary jurisdiction as a court of equity, should it have gone on under the prayer of said petition for general relief to give appellant complete relief in accordance with his rights arising from the allegations of fact in his petition, even to the extent of enforcing all valid and subsisting legal demands.

We think the court below should have given this complete relief.

The jurisdiction of a court of equity, having once acquired jurisdiction of a cause on equitable grounds, to go on to grant complete relief, even to the extent of establishing legal rights and enforcing legal remedies, such as rendering personal decrees for money, damages for breach of contract, etc., is well settled in Virginia by a long line of decisions. See *Chichester* v. *Vass*, 1 Munf. (15 Va.) 98, 4 Am. Dec. 531; *Grubb* v. *Starkey*, 90 Va. 831, 20 S. E. 784; *Beecher* v. *Lewis, &c.*, 84 Va. 630, 6 S. E. 367; *Walters* v. *Farmers* Bank, 76 Va. 12; *McArthur* v. *Chase*, 13 Gratt. (54 Va.) 680; *Stearnes* v. *Beckham*, 30 Gratt. (71 Va.) 379; *Johnston* v. *Bunn, &c.*, 108 Va. 490, 62 S. E. 341, 19 L. R. A. N. S. 1064; and other cases too numerous to cite.

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The authorities cited by counsel for said exceptants on this point of *Linkous* v. *Stevens*, 116 Va. 898, 83 S. E. 417; Black on Judgments, pp. 907-8; *Newberry* v. *Dutton*, 114 Va. 102, 75 S. E. 785; *Green* v. *Spaulding*, 76 Va. 411; *Sweeney* v. *Foster*, 112 Va. 499, 503, 71 S. E. 548; *Spangler* v. *Ashwell*, 114 Va. 325, 328, 76 S. E. 281; and *Branham* v. *Artrip*, 115 Va. 314, 74 S. E. 390, are not in conflict with this rule and are not applicable to the case before us.

Third. Was the legal claim of appellant against Stewart H. Ford beyond the equitable lien on the interest of the latter in the Ford estate, a subsisting demand?

As to this counsel for exceptants take the position in their briefs that,—

(a) All of the said $1,263.50 portion of appellant's debt under the first contract is barred by the three or even five year bar of the statute of limitations, except $200.00 thereof, because $1,063.50 amount of such work was completed in 1903, more than five years before the institution of suit by said petition; exceptants claiming that after doing such $1,063.50 part of the first contract work appellant abandoned work under such contract and did not commence again until he was given the second contract.

(b) The whole of appellant's debt is barred by his laches in not sooner instituting his suit.

As to position (a):

The personal liability of Stewart H. Ford to appellant—and the same is true as to Mrs. Benet—and as to B. W. Ford to the extent of his undertaking under the first contract—did not arise until there was a failure to give a lien on the *corpus* of the Ford estate as promised. This could not have been done by the individuals who contracted to give it, by their personal action, until the contingent interests in remainder became vested, namely, until after the death of Mrs. Ford in 1908. Until then the perfection of the lien promised was within the discretion of the court. Afterwards it was within the power of the promisors, Stew-

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art H. Ford and Mrs. Benet, and of said Herndon who took his share of B. W. Ford's interest *cum onere* as aforesaid without depending upon court approval to comply with said promise. Therefore the statute did not begin to run upon the completion of said portion of work, etc., done in 1903, but upon the failure to give the lien as promised, which did not occur until after the death of Mrs. Ford in 1908. See 25 Cyc., p. 1068, par. 4; 3 Page on Contracts, sec. 1656. This was less than three years before the petition was filed. Therefore, the statute of limitations bars no part of the appellant's debt—aside from any consideration of the fact that the contract for part of the work, etc., was in writing so that the five year statute of limitations applied, and apart from considering whether the contract of 1903 was an entire contract or was severable as to the items of work done, etc., under it.

As to position (b):

As to the assertion of claim of said equitable lien: According to the uncontradicted evidence in the case the delay in presenting the claim of appellant to the court was not the fault of the latter but of Stewart H. Ford, Mrs. Benet and B. W. Ford, and said Herndon stands in the shoes of the latter with respect to this question, having taken what the latter did of the Ford estate *cum onere* as aforesaid.

As to the assertion by appellant of said legal liability to him; the right to assert such liability did not arise until the failure to give the promised lien on the Ford estate occurred, which was not until after the death of Mrs. Ford in 1908, as above stated.

Hence we do not think the doctrine of laches applies in the case before us or can be invoked against appellant by exceptants.

Fourth. Was the legal liability of B. W. Ford, Stewart H. Ford and Mrs. Benet joint or several?

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As we have stated such liability arose from the express promises to make the entire corpus of the Ford estate a security for appellant's debt, and their breach of such promise. This promise of B. W. Ford was confined to the debt which arose under the first contract. It was a contract along with Stewart H. Ford and Mrs. Benet of the one part with appellant of the other part to the extent of $1,263.50 of appellant's said debt and was clearly, we think, a joint contract.

The remaining promises of Stewart H. Ford and Mrs. Benet with respect to providing such security was clearly, we think, a joint contract and covered the remainder of appellant's debt of $1,004.00 under the 1908 contract, and $291.50 under the subsequent contracts.

Fifth. But one other matter remains to be noticed. On August 5, 1911, Stewart H. Ford paid to appellant the sum of twelve hundred dollars "as approximately one-third" of appellant's bill, "principal and interest," which Ford directed to be applied and which appellant in fact applied to the items of the bill or account of latter filed with his petition arising under the contracts subsequent to that of 1903. The result of this application of this payment is as follows:

1. $1,263.50 with interest thereon from December 1, 1908, until paid was left due and unpaid to appellant under said first contract by Stewart H. Ford, Mrs. Benet and C. T. Herndon, for one-third of which there is a lien on the interest belonging to Stewart H. Ford under the control of the said court below, a like lien for one-third thereof on the interest of C. T. Herndon in such fund belonging to him, and a joint personal obligation for the remainder upon Stewart H. Ford and Mrs. Mary Lee Benet, decree for which will create a further lien on said Stewart H. Ford fund under control of court, and to the benefit of such decree against Mrs. Benet the said Stewart H. Ford will be en-

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titled to be subrogated if the lien thereof is enforced against such fund belonging to him.

2. $292.17 with interest thereon from August 5, 1911, until paid, was left due and unpaid to appellant under the other contracts aforesaid by Stewart H. Ford and Mrs. Benet, for one-half of which there is a lien on the interest belonging to Stewart H. Ford under the control of the said court below, and a joint personal obligation of the latter and Mrs. Benet for the remainder thereof, decree for which will create a further lien on said Stewart H. Ford fund under control of court, to the benefit of which decree he will be entitled to be subrogated against Mrs. Benet if the lien thereof is enforced against such fund belonging to him; and with right in said Stewart H. Ford, should he so desire and be so advised, to have a personal decree over against the said Mrs. Benet for one-half of said $1,200 paid as aforesaid by him, to-wit, for $600 with interest from August 5, 1911, until paid.

The foregoing statement under said *Fifth* heading of this opinion is worked out upon the assumption that no funds belonging to Mrs. Benet remain under the control of the court below. This seems to be the fact from the record, but it does not clearly appear. In view of the possibility of error in this matter in the condition of the record before us, this court will not enter in its decree any provisions for the payment of appellant's debt, but will remand the cause to the court below for further decree by it as presently to be stated.

For the foregoing reasons, the decree complained of must be reversed and set aside, and these causes will be remanded to the said court below for further decree therein to be entered not in conflict with this opinion.

Reversed.

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Richmond.

CARY v. HARRIS AND OTHERS.

January 11, 1917.

1. RESCISSION—*Fraud—Evidence.*—It is elementary that a party alleging fraud is required to prove the same by clear and convincing testimony, and this is particularly true in cases involving the rescission of a contract.
2. RESCISSION—*Compromise Contract.*—Compromise agreements are favored and where their rescission is sought on the ground of fraud or duress such fraud or duress must be clearly and convincingly shown.
3. COMPROMISE AND SETTLEMENT—*Duress.*—A contract of compromise, entered into with full knowledge of all the facts, cannot be set aside on the ground of duress when the other party has not been guilty of any unlawful act. The fact that one of the parties entered into such a contract reluctantly, or was badly in need of money at the time, is not sufficient to constitute duress.
4. COMPROMISE AND SETTLEMENT—*Fraud.*—If a party makes a deliberate settlement of an alleged fraud, with his eyes wide open, such settlement will not be disturbed. Parties may settle frauds as well as anything else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a court.

Appeal from a decree of the Chancery Court of Richmond. Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

James E. Cannon and *Samuel A. Anderson,* for the appellant.

G. A. Hanson and *P. W. Hardin,* for the appellees.

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HARRISON, P., delivered the opinion of the court.

This is the second appearance of this cause upon the docket of this court. See *Harris* v. *Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913-a, 1350. At the first hearing a demurrer to the complainant's bills, original, amended and supplemental, which had been sustained by the lower court, was overruled and the cause remanded for further proceedings, this court holding that the bills stated a good cause of action, entitling the complainant to relief, if the facts alleged were established by the evidence to be adduced. The cause is now heard upon its merits, the question being, has the complainant by the evidence adduced established the facts alleged, so as to entitle him to the relief prayed for.

The salient facts alleged are stated in *Harris* v. *Cary*, *supra*, and need not be repeated in detail here. This suit was brought for the rescission or cancellation of two contracts, one dated March 6, 1908, and the other March 18, 1908, upon the ground that said contracts were obtained from him by force, fraud, intimidation and duress. The contract of March 18, 1908, was the necessary result of the contract dated March 6, 1908, and neither added to nor took from the latter. It is the contract of March 6, 1908, known in this record as the "March contract," around which this controversy revolves, and to which our attention is chiefly directed.

It appears from the record that the complainant, J. W. Harris, his brother, W. E. Harris, and the latter's wife, Caroline H. Harris, and W. M. Cary, were engaged in obtaining options and buying coal lands in Buchanan county, Virginia, for purposes of speculation, and that in furtherance of this enterprise "The Buchanan Coal and Coke Company" was organized and chartered, in which these parties held stock in proportion to their respective interests. For his interest the complainant, J. W. Harris, was to furnish

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no money, but was to remain in Buchanan county, prospect for coal in conjunction with W. E. Harris, take options on land, and do what was necessary there to promote and advance the venture. By contract dated May 23, 1904, it was agreed that the money advanced in furtherance of the scheme would constitute the preferred stock of the company and be first paid back with interest, and that all other money, land or property remaining to the corporation, should be treated as profit and belong to the common stockholders, and that J. W. Harris, in lieu of his services rendered in securing the property and to be rendered until the preferred stock was redeemed, should receive one-third of the common stock to be issued.

It is apparent from the record that the contemplated purchases under this contract were very modest compared with those that were subsequently made. Very soon thereafter much larger purchases were made than had been contemplated, and W. M. Cary, who had to pay three-fourths of the purchase money, realizing that this increased expenditure would greatly increase his risk, notified the Harrises that, under the circumstances, he considered the allowance to J. W. Harris, under the May contract, of one-third of the profits for securing options, unduly large, and thereupon, after considering the matter, the parties entered into the contract dated September, 1904, by which the May contract was modified in respect to the division of the common stock of the company. By the terms of this contract the complainant was to receive two-ninths of the common stock instead of one-third thereof, as provided in the May contract.

After the September, 1904, contract was executed, the ideas of the parties still further expanded, the complainant particularly urging that more lands be bought, until March, 1908, when the company had acquired more than 23,000 acres and W. M. Cary had expended $60,000 in paying for

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them. During the time from 1904 to 1908 when these largely added purchases were made, W. M. Cary repeatedly told the Harrises that in view of the increased purchases, which entailed upon him heavier and more serious risks, there would have to be a different distribution of the common stock from that which existed under the September contract. The record shows that there was considerable correspondence and difference of opinion on this subject, until the contract of March, 1908, was executed. That was clearly a compromise adjustment and intended as a final settlement of all differences between the parties.

After this contract had been duly executed, under seal, by the complainant, J. W. Harris, and his brother, W. E. Harris, and by the appellant, W. M. Cary, it was kept by the Harrises, or one of them, for several days and then returned to W. M. Cary with the signature of Caroline H. Harris thereto. This contract recites that differences existed between the parties concerning their respective rights, and that they were desirous of terminating those differences and arriving at an equitable agreement with respect to their interests in the stock of the company, and that, therefore, in consideration of the premises and the mutual concessions moving to and from the parties, the contract was made. It provides that an issue of common stock (which had not theretofore been made) should be made as soon as possible after its execution, and that the complainant, J. W. Harris, should receive three-eighteenths thereof in return for services rendered, and that he should not be required to remain longer on the property of the company.

This is the solemn contract under seal which the complainant asks to have rescinded upon the ground that it was obtained from him by force, fraud, intimidation and duress.

It is elementary that a party alleging fraud is required to prove the same by clear and convincing testimony, and

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this is particularly true in cases involving the rescission of a contract.

In *Virginia-Carolina Co.* v. *Carpenter*, 99 Va. 292, 38 S. E. 143, it is said: "To act in bad faith is to act fraudulently, and, as everyone has attached to his actions the presumption of innocense, it is an established principle that a charge of fraud or bad faith must be clearly and distinctly proven." Citing *Hood* v. *Colbert*, 28 Gratt. (69 Va.) 49; *Gregory* v. *Peoples*, 80 Va. 355.

In *Bonsal* v. *Camp*, 111 Va. 595, 60 S. E. 978, cited with approval in *Sweeney* v. *Foster*, 112 Va. 499, 71 S. E. 548, it is said: "One of the first principles with respect to the rescission of a contract is that, in seeking a remedy which calls for the highest and most drastic exercise of the power of a court of chancery—to annul and set at naught the solemn contract of parties—there must be first a sufficient averment of facts showing the plaintiff entitled in equity to the relief which he seeks, and satisfactory proof of these facts, to justify the interposition of the court; and in addition to all this the court must be able substantially to restore the parties to the position which they occupied before they entered into the contract."

In the recent case of *Ford* v. *Engleman*, 118 Va. 89, 86 S. E. 852, Judge Keith says: "Duress is a species of fraud and hence must be clearly proved."

Authorities upon this point might be multiplied, but it is too well settled to call for further discussion.

It cannot be expected that this court, within the limits of an opinion, can go into a detailed consideration of the great mass of evidence presented by the record before us. It is sufficient to say that, after a careful and laborious examination of all the evidence adduced, we are of opinion that the complainant has failed to establish the charges in his bills with that degree of clearness and certainty that the law requires. On the contrary the decided weight of the

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evidence and the circumstances attending the execution of the contract establish the negative. The contract, the rescission of which is here asked, is under the hands and seals of the parties, and appears upon its face to be an equitable settlement of differences of opinion, and the evidence shows that it was intended as a compromise of all matters in dispute between them. Compromise agreements are favored. They are properly resorted to every day as a means of avoiding litigation, by a final adjustment of disputed matters by the parties themselves.

In *U. S.* v. *Child,* 12 Wall. 232, 20 L. Ed. 360, Mr. Justice Miller, speaking for the Supreme Court says: "We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances property is withheld from the owner and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party, who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unlitigated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him, for its compromise will be void as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void."

The case of *Andrews* v. *Conolly* (C. C.) 145 Fed. 43, in which the disputes and disagreements between the parties arose over mining properties and continued for years before

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the final written contract was executed, presents some striking analogies to the case at bar. The court, after stating that it did not deem it necessary to review the history of the various disputes between the brothers, nor to attempt to fix the blame therefor, and further that it was sufficient for the purposes of the case that such disputes did in fact exist, and that the parties attempted to settle them by a written contract wherein the rights of the parties were defined, expressed the opinion that there was no duress; and in discussing the subject said, in part: "The proofs contained in the record do not show that Michael Connolly did any unlawful act to deprive the defendant of his property, or to compel him to do what he acknowledges he did do, yield to the pressure of the circumstances surrounding him and sign the agreement of settlement. I think the signing of the contract, under the circumstances disclosed by the record in this case, must be regarded, both at law and in equity, as a voluntary act, as it was unattended by any act of violence or threat of any kind calculated in any degree to intimidate the defendant, or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he doubtless did, still the fact remains that he did consent when he might have refused, and, having consented and signed the contract, I think he is bound by its terms. This is especially true when we come to consider the character of the transaction and the relation of the parties to the contract. It was entered into for the purpose of defining the rights of the parties and putting an end to the disputes and disagreements which had theretofore existed between the brothers."

In *French* v. *Shoemaker*, 14 Wall. 314, 20 L. Ed. 852, second syllabus, it is said: "Equity will not set aside a contract whose purpose is a settlement of disputes, simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for

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his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing. Equity favors amicable compromise of controversies where pecuniary interests are complicated and conflicting." See also *Mason* v. *United States*, 17 Wall. 67, 21 L. Ed. 564, *Hackley* v. *Headley*, 45 Mich. 569, 8 N. W. 511, *Batavian Bank* v. *North*, 114 Wis. 637, 90 N. W. 1016; *Ham* v. *Hamilton*, 29 Ga. 40.

These decisions all declare the doctrine that a contract of compromise, entered into with full knowledge of all the facts, cannot be set aside on the ground of duress when the other party has not been guilty of any unlawful act.

As said in *Ham* v. *Hamilton, supra:* "If the complainant ever had any equity, it is clear he has *settled himself* out of it. He made a deliberate settlement of all the alleged fraud, with his eyes wide open. Parties may settle frauds as well as anything else, if they act with knowledge of the facts; and such settlement is as effectual when made by the parties as when made by a court. He is here asking the court to act where he has already himself taken final action. There must be an end to litigation."

The complainant in the court below has, at the bar of this court, pressed upon our notice the contention that a fiduciary relationship existed between himself and the appellant; that the appellant as president of the company and owning a controlling interest in the stock occupied the position of trustee for the benefit of the other stockholders; and that as such trustee he had violated his trust. This position does not appear to have been urged in the lower court or noticed by the learned judge who there considered the case. Without considering whether any such relation existed between those parties as is now claimed, it is sufficient to say that the record does not show that the appellant has violated any confidence reposed in him with respect to the

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complainant, or done any act to his prejudice that he was under any legal duty to refrain from doing.

Upon the whole case, we are of opinion to reverse the decree appealed from and to enter here such decree as the lower court ought to have entered, dismissing the complainant's bills with costs.

Reversed.

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Richmond.

CARY V. HOLT'S EX'ORS.

January 11, 1917.

1. CONTRACTS—*Construction.*—Where a contract refers to prior contracts, to which one of the parties was a party, for further particulars, it must be construed with reference to such prior contracts.
2. CORPORATIONS—*Promoters—Construction of Contract.*—The preamble of a contract recited that the organization of a company for dealing in the purchase and sale of coal lands was effected upon the understanding that appellant "should advance three-fourths of the cost of said property" (referring to said coal lands) "or so much thereof as might be necessary for the purposes of the company," and that he should have a certain part of all profits to be made upon the said advancements through the organization of said company to take over the coal lands. Three prior contracts of the appellant with other parties in regard to the same enterprise were referred to for further particulars. The preamble also recited that under these prior contracts appellant "would be required to advance only so much" of his agreed input aforesaid "as might be required to pay the cost of the property before a sale of the same by the company was effected." From the body of the contract it appeared that appellant for a certain sum sold to the appellees part of his interest under the prior contracts in the stock of the corporation. The contract further provided that in case any further input of cash towards the payment of appellant's "input of three-fourths of said purchase money is required of and made by him," appellees' interest should be reduced. One of the prior contracts contained a provision that, "All expenses incident to the successful carrying out of the purposes of said corporation are to be borne by the said corporation." Appellant paid into the treasury of the corporation a sum of money to cover the expenses of such corporation due to its payment to the appellant of that amount on account of his salary.

   Held: That appellant was obligated by his contract to pay into the treasury of the corporation his proportion of "all

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expenses incident to the successful carrying out of the purposes of the said corporation," as well as to pay what was strictly purchase money of the company's property, and that his salary was such an expense.

3. CORPORATIONS—*Promoters—Sale of Part of Promoter's Interest.*—Appellees upon the purchase of an interest in appellant's contract, knowing of the provisions of the above contract and of a resolution of the board of directors fixing appellant's salary, were charged with notice of his rights.

4. CORPORATIONS—*Estoppel of Director.*—Under a pooling agreement made at the time of a sale of part of the interest of appellant to appellees, it was agreed that the president's salary should be arranged at a stockholder's meeting.

Held: That notwithstanding this agreement, appellees could not object to the salary fixed at a director's meeting, where one of them who also represented the other took part in the action.

5. ESTOPPEL.—Letters written by appellant to appellees, stating the amount of indebtedness against the company, which failed to mention expressly the salary expense, but which urged appellees to come at once and to look into everything for themselves, did not operate to estop appellant from claiming the salary expense.

6. CORPORATIONS—*Promoters—Construction.*—The salary expense, having been treated by the corporation in effect as a necessary expense attendant upon the acquisition of the lands of the company, and having been so recognized by the appellees, should be computed as input of appellant in calculating the proportion of common stock to which he is entitled.

7. CORPORATIONS—*Promoters—Necessary Expenses.*—Appellant paid into the treasury of the company a certain sum to cover the expenses of the corporation for office rent and stenographer's hire. This was properly held by the court below to be an input of the appellant into the corporation, which he is entitled to have computed in the calculation of the amount of common stock of such corporation to which he is entitled, there being a resolution of the board of directors that a bill rendered by appellant for such rent and stenographer's hire be paid.

8. CORPORATIONS—*Promoters Contract to Pay Necessary Expenses.*—A payment by appellant at the treasury for necessary expenses should be computed as an input of defendant in calculating the proportion of common stock to which he was entitled, although funds were received by the corporation because of the exercise of an option subsequent to the input and before the obligations became payable.

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Appeal from the Law and Equity Court of the city of Richmond. Decree for plaintiffs. Defendant appeals.

Reversed.

The opinion states the case.

James E. Cannon and *Samuel A. Anderson,* for the appellant.

J. M. Perry, for the appellees.

SIMS, J., delivered the opinion of the court.

The question before us in this case is, What proportion of the common stock of the Buchanan Coal and Coke Co., Inc., belongs to appellant and appellees, respectively?

The business of the Buchanan Coal and Coke Co., Inc., was that of dealing in the purchase and sale of coal lands, including lands in fee and mineral, mining and surface rights pertaining to such lands. Its authorized capital stock was $500,000, of which $200,000 was authorized to be issued as preferred stock and $300,000 as common stock.

What proportion of said common stock belongs to appellant and what to appellees depends upon the construction of the contract of March 27, 1908, under which these parties claim such stock, designated in the record as the "sale contract," and upon certain facts as to items in controversy of input of appellant into the capital of said company.

The following statement will sufficiently disclose the provisions of the "sale contract" which are pertinent to the question before us:

It is recited in the preamble of this contract that the organization of said company was effected upon the distinct understanding that appellant "should advance three-fourths *of the cost of said property*" (referring to said coal lands) "or so much thereof as might be necessary for the purposes

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of the company," and that he should have 11/18 of all profits to be made upon said advancements to be realized through the organization of said company to take over said lands; the contract of appellant with certain Harrises is referred to "for further particulars;" three prior contracts in writing between appellant and the Harrises are referred to, which contain "the contract with the Harrises;" and it is further recited in said preamble that it is provided in the contract of appellant with the Harrises that appellant "would be required to advance only so much" of his agreed input aforesaid "*as might be required to pay the cost of the property before a sale of the same by the company was effected,* and that all common stock of the company (except twenty-three shares thereof held by Smarr and Boyd * *) should be divided between the parties to said" (the Harrises) "contract in the proportion above mentioned," (*i. e.,* 7/18 to the Harrises and 11/18 to appellant).

The "sale contract" preamble further recites what amounts of input of capital of the company the Harrises and appellant, respectively, had made up to the date of such contract.

From the body of this contract itself it appears that appellant, on the date thereof, March 27, 1908, for $15,000 cash in hand paid, sold to Charles A. Holt and Julius L. Witz 15/83 part of his 11/18 interest "*under his said contract with the said Harrises in and to the capital stock of* said Buchanan Coal and Coke Co., Inc.," with the provision, however, that the said 15/83 part of appellant's said interest so sold "is subject to reduction, ratably with said Cary's" (appellant's) "remaining sixty-eight eighty-thirds (68/83) part thereof, in case of the necessity of further cash input and of actual cash input by said Cary *under his said contract with the Harrises,* to the extent hereinbelow stated and no further." Then follows the provision that "in case any further input of cash towards the payment of

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said Cary's input of three-fourths of *said purchase money* is required of and made by him * * * the said Holt and the said Witz, under this agreement * * shall be entitled to such proportion of eleven-eighteenths of 2,977 shares of common stock * * of said Buchanan Coal and Coke Co., Inc., * * as is represented by a fraction whose numerator is fifteen and whose denominator is eighty-three, plus the number of thousands ($1,000.00 being the unit) of dollars of such additional actual input made before sale * * *"

"The contract with the Harrises" referred to in said "sale contract" was contained in three contracts in writing, specifically mentioned in the preamble of the "sale contract," one of March 6, 1908, another of September 3, 1904, and still another of May 23, 1904.

These contracts provide, in effect, that the input of appellant into the company shall be three-fourths of the capital necessary for the transaction of its said business. Beyond this there is nothing in the March 6, 1908, contract which is material to the question before us.

The only provision in the contract of September, 1904, having any special bearing on the question before us is the following:

"* * it is agreed that *any expense of said company* which is paid in the common stock of the company is to fall equally upon, or be paid equally by, all and each party to the agreement."

The contract of May 23, 1904, provides, in effect, that the input which appellant was obligated to make into said company should be paid for preferred stock of such company; that the preferred stock should be issued at par and only for the necessary capital of the company; that this stock should bear interest at the rate of 6% per annum, and that when the property of the company should be sold, or its affairs came to be wound up," * * * it is further agreed

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that after redeeming the preferred stock * * and paying the interest on amounts invested in said preferred stock by the parties hereto, that all other money, land or property remaining to said corporation" (the Buchanan Coal and Coke Co., Inc.),"shall be treated as profit and belong to the common stockholders." It then contains the following clause:

"All expenses incident to the successful carrying out of the purposes of said corporation are to be borne by the said corporation."

(The italics appearing in quotations above are supplied by us).

With respect to input of the appellant into the said company, the following should be here said:

There are two items of such input in controversy before us.

(a) The amount of $5,050.00, which appellant paid into the treasury of said company between April 1, 1908, and October 4, 1909, inclusive, to cover the expenses of such corporation due to its payment to appellant of such amount on account of his salary of $200.00 per month from May 1. 1907, to October 4, 1909, for services to the company in and about the purchase of the property; and

(b) The amount of $1,088.00 which appellant paid into the treasury of said company February 27, 1909, to cover expenses of such corporation for office rent and stenographer's hire from July 1, 1904, to May 1, 1907.

The decree of the court below, entered October 11, 1915, held that while appellant was justly and legally entitled to the item (a) above noted as salary, such item of $5,050.00 should not be computed as input of appellant under said sale contract because this item "in the opinion of the court was not a necessary expense attendant upon the acquisition of the said lands of said defendant company." This hold-

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ing is the sole ground of error assigned before us by appellant.

The court below held that said item "(b)" should be computed as input of appellant under said "sale contract," and this is assigned as cross-error before us by appellees.

Appellees also assign as cross-error that there was a mistake in the figures of $102,200, total input claimed by appellant.

We have, therefore, but the three questions to decide, which we will consider in their order as stated below, namely:

1. Was the $5,050 item (a) above referred to an input of appellant into said corporation which he is entitled to have computed in the calculation of the amount of common stock of such corporation to which he is entitled?

We think it was. The "sale contract" referred to the existing agreement between appellant and the Harrises as fixing the "input" into the treasury of the said corporation which appellant had contracted to make and by which his proportion of the common stock of such corporation was to be ascertained. Such existing agreement was contained in said prior contracts above referred to, of dates May 23, 1904, September 3, 1904, and March 6, 1908. The "sale contract" must therefore be construed along with such three prior contracts in determining what "input" aforesaid appellant had contracted to make and by which his proportion of common stock aforesaid was to be ascertained. While it is true that there is a phrase in the "sale contract" which refers to such "input" as being "any further input of cash towards the payment of said Cary's agreed input of three-fourths of said *purchase money" of the company's property*, in the same "sale contract" Cary's agreed input of three-fourths of the *cost of the company's property* is used with the same meaning. Therefore, it is

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manifest that the true construction of the "sale contract" could not be that appellant's said "input" must have been confined to money actually paid to the vendors of the property as purchase money. Some expenses of the company or corporation aforesaid were clearly contemplated by the "sale contract" as included in the language "purchase money" or "cost of the company's property." This is admitted in the bill of appellees where the position is taken that "the amount of expenses paid by said corporation * * actually constituting a part of the cost of said lands" are properly to be computed, where contributed by appellant as his "input" aforesaid; and in the brief of counsel for appellees the same position is taken. Now when we look to the contract of September 3, 1904, we see that other expenses than actual payment by the corporation of purchase money to vendors of the property of the company are contemplated. Further, when we look to the contract of May 23, 1904, which is the contract which fixes the obligation of appellant with respect to *input* aforesaid, we find this express language with reference to what expenses are to be paid by the corporation, to-wit:

"All expenses incident to the successful carrying out of the purposes of the said corporation are to be borne by the said corporation."

It is, therefore, clear that the true construction of the "sale contract" is that appellant was obligated thereby to pay into the treasury of the corporation his proportion of three-fourths or so much thereof as was needed to defray "all expenses incident to the successful carrying out of the purposes of the said corporation" as well as to pay what was strictly "purchase money" of the company's property. The evidence is further that appellee Witz and the decedent Holt, of whom the executor appellee is the personal representative, knew of all of the provisions of all of said prior contracts before the "sale contract" was entered into.

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The inquiry with respect to the item of input under consideration is reduced to this: Was this $5,050.00 of salary an item of the "expenses incident to the successful carrying out of the purposes of the said corporation?"

That it was such an item is shown by a resolution of the board of directors of the corporation adopted February 29, 1908, allowing appellant, as president thereof, a salary of $2,400.00 per annum, beginning with May 1, 1907. This, it is true, was prior to the date, March 27, 1908, of the "sale contract" by which appellees' rights were fixed; but it appears from a letter of date March 23, 1908, of counsel for Messrs. Holt and Witz, parties to such "sale contract," that Mr. Witz, who was acting for himself and Capt. Holt, knew of the salary expense of the corporation before the "sale contract" was entered into, and the only suggestion in the way of an objection to such expense was that Mr. Witz "is of opinion that the salary should be limited to a term of one year and its amount thereafter to be fixed by the pool; the permanent salary at a figure such as that now had, unless agreed to by the pool, would be unattractive to him."

At the date the "sale contract" was entered into, therefore, appellees are charged with knowledge that appellant was entitled to draw a salary of $200 per month from May 1, 1907, which as of March 31, 1908, would have amounted to $2,000, as an expense "incident to the successful carrying out of the purposes of the said corporation," and to defray which along with other outlay it followed from the provisions of the "sale contract" the "input" of appellant was obligated by him to be made, etc.

On the same date as the "sale contract," to-wit: March 27, 1908, a "pooling" agreement was entered into between appellant and the same other parties as those to the "sale contract." In this "pooling" agreement the said resolution

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of February 29, 1908, of the board of directors of said corporation was referred to in the following language:

"The present salary of the president of said corporation, $200.00 per month, as fixed by directors' resolution of February 29, 1908, shall continue for the term of one year from the date of said resolution; but at the end of said term at a stockholders' meeting wherein such matters can be arranged, the trustees shall vote said common stock for such salary only to the president as shall be suggested to them by a writing signed by at least two-thirds in number of the parties hereto; and in default of such direction, shall vote against any further continuance of said salary after the end of the year commencing February 29, 1908."

This also evidences full notice to one appellee, Witz, and to Holt, under whom the other appellee claims, of the expense of salary incurred by said corporation up to February 29, 1909, which amounted to $4,400 of the $5,050 item under consideration.

On April 30, 1909, the entire membership being present, including said Witz, the directors of said corporation adopted the following resolution:

"Resolved, that the present salary of the president of this company shall continue at the same rate for another year, that is to say, from February 29, 1909, until February 29, 1910, he shall receive the salary of two hundred dollars per month, but in the event of a sale, this salary shall terminate when a deed is made by the company."

It is true this was an action of a directors' and not at a stockholders' meeting, as provided for in the said "pooling" agreement, but appellees cannot be heard to make this objection as Mr. Witz, representing himself and Mr. Holt, took part in this action.

Thus the remainder of said $5,050 input of appellant to cover said salary expense was authorized and approved by said corporation, and by appellees, in effect, as an item of

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the expenses for the defraying of which appellant was obligated to make the input aforesaid and which he is entitled to have included in the computation of to what proportion of said common stock he is entitled under said "sale contract."

A letter of appellant, of date February 27, 1908, is relied on by appellees as an estoppel of appellant's claim that said $5,050 item was an expense of the corporation. This letter was addressed to Capt. Holt. It was in reply to a letter from the latter to appellant, one inquiry of which was: "What amount of money would clean up all the indebtedness against the company so there would be no further sums to raise?" In his letter of February 27, 1908, to Capt. Holt, appellant stated:

"Forty thousand dollars will clean up all the indebtedness against the company and there will be no further sum for me to raise. * * *.

"As I advised you when here, I shall not need more than $15,000.00 for the next possibly eight months, in which time I am perfectly confident that the property will be sold at a handsome profit. Failing in this, however, there will be no trouble in the world in securing whatever other moneys we may need, even should it become necessary to pay off the entire indebtedness. * * *

"Since writing the above it has occurred to me that $12,000 will answer my purposes until you get back from California. Should the property, however, not have been sold by that time, and I find it necessary to raise a few thousand more, we can arrange the same after you return or you might arrange for me to get it if I wish while you are gone, as I really prefer not to take more than $12,000 at this time. * * *

"I cut out 1,000 acres in fee in order to reduce our total money requirements."

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This letter was written before the resolution of February 29, 1908, of board of directors was passed making the said salary from May 1, 1907, an expense of the corporation and hence an indebtedness of it. Prior to that time appellant had been rendering valuable services to the corporation without any salary compensation. It was on the motion of W. E. Harris that the resolution of February 29, 1908, was adopted, the directors thinking then that this salary expense should be made an indebtedness of the corporation. Hence there was no misrepresentation by appellant of the indebtedness of the corporation in his letter of February 27, 1908.

Appellant wrote Capt. Holt, under date February 29, 1908, as follows:

"As I told you, a friend of mine and myself are now taking care of $14,000 of this debt, so we won't have to raise very much more even if the property is not sold in a year, while I confidently believe now that it will be sold in ninety days. * * *

"P. S. Think now that I will be able to give you a definite answer not later than Tuesday next. If you join me, would want you to come to Richmond and close the matter before you leave for the West."

Again, under date March 1, 1908, after the last-named resolution was passed, appellant wrote Capt. Holt:

"From my statement you will observe that fully 70% of the property is paid for. Several thousand acres have been paid for in full, while of the average cost of the entire property, including attorney's fees, perfecting titles, surveying each and every tract, maps, reports, making coal openings all over the property, in other words proving the property, over an area of some 25 or 30 miles, costing alone some $1,400 to $1,500 and maybe more, but money well spent, because it is now proven to be a magnificent coal bed, second to none in quantity or quality. * * * Now I have endeavored to make myself perfectly and clearly under-

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stood. Want you to know everything, could not, would not, keep back anything for my life, much less a few dollars, so I respectfully request that you and your friends come to Richmond at once and look into everything for yourselves, and if they are not to the letter as I have stated, then you can't put one dollar into this proposition. I particularly request you to come, Captain, before you leave for the West, and bring your friends with you."

It does not appear that there was any misrepresentation in these two letters of February 29 and March 1, 1908, concerning the salary expense to February 29, 1908, as an indebtedness of the corporation or cost of its property. It is true appellant does not mention expressly the salary expense, but he urges that Capt. Holt and his friends "come to Richmond at once and look into everything for themselves," and he added, "I particularly request you to come, Captain, before you leave for the West, and bring your friends with you."

Two statements, one of bills payable as of March 1, 1908, the other of the condition of said corporation at the close of business February 29, 1908, are filed with the bill as "Exhibit A," marked in record, pp. 130 and 128, as "Complainant's No. 20" and "Complainant's No. 19," which do not show any indebtedness of the corporation to appellant for salary—but it appears from Mr. Witz's deposition that it is not clear that these statements were furnished him until June, 1908, after the "sale contract" was entered into. However, in view of the fact that a trip to Richmond and looking "into everything for themselves" would have disclosed the February 29, 1908, resolution, and especially in view of the specific knowledge on the part of Mr. Witz, acting then for himself and as agent for Capt. Holt, subsequently acquired, as above stated, of the existence of the resolution of February 29, 1908, before the "sale contract" was entered into, the express recognition of the existence

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of that resolution in the "pooling" agreement, contemporaneous with the "sale contract" and hence the recognition of said salary to February 29, 1908, as a legitimate expense of the corporation, the authorization of the continuance of such expense by such "pooling" agreement from February 29, 1908, to February 28, 1909; and the subsequent authorization of a like continuance from February 28, 1909, to February 28, 1910, or until sale of the company's property, by the resolution of board of directors of April 1, 1909, in which Mr. Witz participated as above noted—which salary expense appellant ceased to draw on October 4, 1909—we do not think there was any action of appellant which could have misled Capt. Holt or Mr. Witz, and hence which could operate as an estoppel against appellant as to such salary item of expense of the corporation.

The evidence in the case shows that if this salary item was a proper expense of the corporation "incident to the successful carrying out of the purposes of the said corporation," the *input* made by appellant to cover same was necessary, as the corporation was not in funds to meet same and its other obligations up to October 4, 1909, when such input for salary expense ceased.

This salary expense having been treated by the corporation, in effect, as "a necessary expense attendant upon the acquisition of the said lands of said defendant company," and having been so recognized subsequently by Capt. Holt and Mr. Witz, as aforesaid, we think the decree complained of was erroneous in holding to the contrary.

We come now to consider the remaining questions before us in the case, namely:

2. Was the $1,088, item "(b)" above referred to, properly held by the court below to be an input of appellant into said corporation, which he is entitled to have computed in the calculation of the amount of common stock of such corporation to which he is entitled?

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We think it was.

On February 7, 1909, appellant presented the bill for this $1,088 to the board of directors of the company, and the following resolution was adopted by such board, of which Mr. Witz was a member, on this subject:

"It was moved and seconded that the bill of W. M. Cary for office rent and stenographers' hire, amounting to ten hundred and eighty-eight dollars ($1,088.00) be paid, and that preferred stock be issued to him in satisfaction of said bill. The motion was unanimously adopted."

This is satisfactory evidence that such expenses were proper "expenses incident to the successful carrying out of the purposes of said corporation," and hence fell within the obligation of appellant as to input of money to defray same, if the situation was such at the time of the input by appellant to defray same that such input was then necessary.

This input of appellant on account of meeting and defraying such expenses was made February 27, 1909, as appears from record, p. 191. Such input was unquestionably necessary to defray such expenses at that time as the record shows. However, it seems that the appellant made an input of money into the treasury of the company of $1,000 on October 4, 1909, for which preferred stock was issued to him. This is a separate and distinct matter from the $1,088 item as to which cross-assignment of error is made before us, as we understand it. But if we were to consider the $1,000 input on October 4, 1909, involved in such cross-assignment of error, the following seem to be the facts as to the need for such input at that time:

In reply to inquiry as to such $1,000 input, appellant testified:

"Yes, sir, I made it because on that date, October 4, 1909, the company had outstanding obligations due and payable amounting to, principal and interest, between twenty-one and twenty-two thousand dollars, for three-fourths of

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which I was personally liable under the March 6, 1908, contract with the Harrises; * * * I felt it my duty to make provision for whatever demands might come upon the company on account of these past due and payable obligations; and so, whenever I had any money to spare, which I felt would contribute to that end, I put it to the credit of the company's account in bank and received credit upon the books of the company."

While it is true that in November, 1909, purchasers of property from said corporation paid to it a very large sum of money on an option not exercised until then, and it turned out that appellant might have waited until then for funds to meet existing obligations of the corporation, and if he had not paid in the last $1,000 of input by him into the treasury of the corporation it would not have been sued on its obligations, still the fact was that appellant had no means of knowing on October 4 that such option would be exercised or that the corporation would be in funds from any other source to meet obligations then existing of between $21,000 and $22,000, for nearly all of which appellant's obligation as to input required him to make input into the treasury of the company as he was behind in his input to the extent of some $18,800 of his proportion of three-fourths of needed capital—the Harrises having made an input of $34,999 under their obligation to contribute one-fourth of such capital and appellant having contributed only $101,200, not including such $1,000, but including said salary amount of $5,050 and said $1,088 item; he had $1,000 personal funds available for application to that small extent to such obligation, and made the input of it on that date in good faith, with no thought or purpose of unduly swelling his proportion of the common stock of the company; and we, therefore, think the court below was clearly right in holding as it did in effect that appellant is entitled to have this $1,000 input as well as said $1,088

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input computed in the calculation of the proportion of common stock to which he is entitled.

3. We come now to the remaining assignment of cross-error, which involves the question whether there was a mistake in figures by which the total input of appellant was ascertained to be $102,200.

In the brief for appellees a tabulation of figures is given, taken from the cross-examination of Mr. Sutton, the accountant, exclusive of appellant's salary, as follows:

Paid on account of lands and notes given for deferred payments on lands by the company		$100,322 16
Paid on interest account		2,884 19
Paid for expenses of every kind from the organization of the company, including office rent, stenographers' salary, etc., but excluding any salary to W. M. Cary (*and including also the $1,088 item above mentioned to Cary*)—(Italics supplied, and counsel is in error as it seems to us in statement contained in language *italicised* as presently pointed out)		14,298 84
Total		$117,505 19
During the same time the Harrises had contributed $35,005 (correct amount per p. 196 record)	34,999 00	
Income from sources other than Harrises and Cary	5,786 50	40,785 50

(NOTE.—The tabulated statement referred to also deducts $2,039.10 cash on hand, but clearly this should not be done).

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Total input by appellant per these figures....		$ 76,719 69
(Not including his salary item of $5,050.00).		
Add such salary item.....		5,050 00
		$81,769 69
Add also the October 4, 1909, $1,000 input not included in figures given in said tabulated statement		1,000 00
Comparing this witness' statement on p. 196 of record with those on pp. 188 and 144 of record, there is some discrepancy in totals which the record does not give sufficient details to check out, but it is evident that the foregoing figures are taken from the "cash book" of the company.		
This witness testifies that to those figures should be added the following items of input of appellant credited on the "Journal" of the company and not on the "cash book," viz.:		
Ratliff land	$11,404 93	
McCue input, principal.....	5,156 28	
interest	300 00	
Expense before opening of books of company	442 00	
Above named item of	1,088 00	18,391 21
Total input of appellant arrived at in this way.		$101,160 90
Instead of.....	$102,200 00	
as per itemized statement of witness, Sutton, pp. 189-90 of record.		
An error (to balance) of		1,039 10
	$102,200 00	$102,200 00

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However, this witness furnishes said itemized statement which totals said input of $102,200.00. He also testifies, on p. 189 record, that appellant's input, as shown by said *cash book* totals.....	$ 83,808 79
(a discrepancy of $1,039.10 from the total of $82,769.69 above ascertained by dealing with the items given in this witness' deposition on cross-examination, p. 196 record). He positively testifies, however, on p. 189 of record, that the said *journal* entries are to be added to the $83,808.79 input shown by said "cash book"	18,391 21
Making a total of.....	$102,200 00

In the condition of the record before us, therefore, we cannot say that there has been an error in figures made in the total of $102,200 as the input of appellant into said company, by which the denominator of the fraction is to be ascertained, which fixes his proportion of the common stock of the said company and also the proportion of such stock to which appellees are entitled, and such $102,200 must be held to be the correct denominator of such fraction, and the cross-errors assigned as aforesaid cannot be sustained.

Because of its holding above referred to, however, with respect to said $5,050.00 input of appellant, the decree of the court below complained of must be reversed, for the reasons stated above, and the cause is remanded to the law and equity court for further proceedings therein not in conflict with this opinion.

Reversed.

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Syllabus.

Richmond.

CITY OF DANVILLE v. LIPFORD.

January 11, 1917.

1. NEW TRIAL—*Master and Servant.*—In an action by a servant against his master for personal injuries, due to the negligence of the master, a verdict for the servant will not be set aside, although there is much in the evidence tending to show that the plaintiff's injury was due to a mere accident, without fault on the part of the defendant, where there is also evidence sufficient to sustain the finding of the jury to the contrary.
2. INSTRUCTIONS—*Master and Servant*—In an action for personal injuries by a servant against his master, where the instructions deal with familiar principles, and those given by the court fully and fairly submit to the jury the theory of each party, an assignment of error to the action of the court in giving and refusing the instructions to the jury is without merit.
3. INSTRUCTIONS—*Master and Servant—Instruction Covered by one Already Given.*—In an action by a servant against his master for personal injuries received while working upon a defective trestle, the defendant asks the following instruction, which was refused: "The court instructs the jury that the unbending test of negligence is the general usage and practice of companies using like instrumentalities, and in order to establish negligence on the part of the defendant, plaintiff must show by a preponderance of the evidence that the trestle in question was dangerous and not up to the standard established by the ordinary usage of the business." This was held no error. The evidence upon which the defendant sought to avail itself of the unbending test to be found in the ordinary usage of the business was exceedingly meagre. If the defendant had the right at all under the evidence to have the jury consider the practice of persons using trestles similar to the one in question here, that right was fully protected by an instruction given for defendant which stated "that ordinary or reasonable care is such care as other reasonably prudent companies or persons use in conducting a like business."
4. EVIDENCE—*Irrelevant Evidence—Harmless Error.*—In an action by a servant against his master for injuries sustained while

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working upon a trestle, defendant moved to exclude all evidence in relation to ice which was shown to have formed on the surface of the trestle. There was no mention of this ice in the declaration, but the motion to exclude the evidence in regard to it was not made until after the plaintiff had been fully cross-examined about it, had rested his case, and the defendant had examined the principal witness in its own behalf. Counsel then stated to the court that "in going over the declaration again" he had noticed that the ice was not mentioned, and he therefore moved the court to exclude the evidence in regard to it. The court replied that "it would hardly be proper to exclude that evidence entirely; it may go to the jury in order that the whole surrounding circumstances may be considered; but the jury will be instructed, if requested, that if they believe that the ice on the track was the proximate cause of the injury, there could be no recovery in this case." This statement by the court seems to have been made in the presence of the jury; and, in addition thereto, when all the evidence was in, the court did give the following written instruction: "The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury they must find for the defendant."

Held: Under these circumstances there was no error in the action of the court in this regard.

Error to a judgment of the Circuit Court of the city of Danville. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

Instructions given for plaintiff:

1. The court instructs the jury that it was the duty of the defendant to use ordinary care to provide and maintain a reasonably safe and suitable trestle or structure upon which it required plaintiff to perform duties it assigned him, and if they believe from the evidence that defendant failed to do this and plaintiff was injured while in discharge of his said duties without negligence on his part, and said injuries were proximately caused by said negligence, they should find for the plaintiff, unless they believe from the evidence that the injuries complained of resulted from a

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defect in the trestle that was open and obvious to the plaintiff or he had actual knowledge of such defect.

110 Va. 850.

2. The court further instructs the jury that the plaintiff had a right to presume that defendant had performed its duty in regard to providing him a reasonably safe place in which to work and a reasonably safe trestle or structure upon which to work, unless the defect complained of was open and obvious to the plaintiff or he had actual knowledge of such defect.

88 Va. 546. 90 Va. 249.

3. The court instructs the jury that if they should find for the plaintiff they may, in estimating the damages, take into consideration his physical and mental suffering arising from his injury, his loss of wages, if any, and the time he was prevented by said injuries from working, all moneys paid out and expenses incurred by him in his endeavor to be healed of said injuries, and proper compensation for his being deprived by said injuries from following such calling or business as he could have followed but for said injuries; all of which shall not exceed $2,000.00, amount charged in declaration.

Instructions requested by defendant but refused:

E. The court instructs the jury that the unbending test of negligence is the general usage and practice of companies using like instrumentalities, and in order to establish negligence on the part of the defendant plaintiff must show by a preponderance of the evidence that the trestle in question was dangerous and was not up to the standard established by the ordinary usage of the business.

110 Va. 847.

I. The court instructs the jury that if they believe from the evidence that the weight of the loaded car or the handling of the car caused plaintiff to lose his balance and step

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in the opening or fall from the trestle, they must find for the defendant.

J. The court instructs the jury, if they believe from the evidence the opening in the trestle was open and obvious or plaintiff could in the exercise of ordinary care have known of the opening and the danger of slipping in same, this was a risk assumed by the plaintiff and they must find for the defendant.

Instructions given for defendant:

"A." The court instructs the jury that the mere fact that the plaintiff was injured while working on a trestle maintained by the city of Danville, will not warrant them in finding a verdict against the city of Danville. The gravamen of this action is the alleged negligence of the defendant and until this is shown by a preponderance of the evidence to the satisfaction of the jury, there can be no recovery against the defendant.

"B." The court instructs the jury that ordinary or reasonable care is such care as other reasonably prudent companies or persons use in conducting a like business; that it was only the duty of the city of Danville to use reasonable care as above set out in conducting its gas business, but it was not its duty to adopt a mode of conducting its business different from its usual custom, because some may think such mode a safer way to conduct it; that the city of Danville was not an insurer of said Lipford and was not bound to provide him an absolutely safe place to work in, but was only bound to exercise ordinary care to provide him a reasonably safe place in which to work.

"C." The court instructs the jury that when a servant enters the service of the master, he assumes all the ordinary risk of such service, and, also as a general rule, assumes all risk from causes which are known to him, or should be readily discernible by a person of his age or capacity, in the exercise of ordinary care. When the employee is placed by

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his employer in a position where he can see, or with reasonable intelligence and care find and disclose the dangers of such position, and is a mature man, doing the ordinary work which he has engaged to do, and whose risks are obvious to anyone, he assumes the risk of the employment and no negligence can be imputed to the employer for an accident to him therefrom.

"D." The court further instructs the jury that if they should believe from the evidence that the defendant city was negligent in maintaining said trestle, yet if they further believe from the evidence that the plaintiff knew, or could by the exercise of ordinary care have known of the danger incident to the use of said trestle, and by the use of ordinary care on his part have avoided this alleged defect, and through his own lack of care contributed to his injury, they must find for the defendant.

"F." The court further instructs the jury that the defendant in this action was under no greater obligation to care for the safety of the plaintiff, J. E. Lipford, than the said J. E. Lipford was to care for his own safety; and if the jury believe from the evidence that said Lipford knew of the alleged defect in said trestle and that it was dangerous to step in or get his foot caught in said hole, and that in the exercise of due care he should have avoided coming in contact with said hole, then they should find for the defendant in this action.

"G." The court instructs the jury that even if they believe from the evidence that the trestle was defective, as alleged in the declaration, and that this was due to neglect on the part of the defendant, yet if they further believe from the evidence that this defect was open and obvious and that plaintiff had full knowledge of its danger, the use of the trestle by plaintiff in its dangerous condition was a risk assumed by the plaintiff and you should find for the defendant.

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"H." The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of his injury they must find for the defendant.

E. Walton Brown, for the plaintiff in error.

B. H. Custer, for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is a writ of error to a judgment in favor of J. D. Lipford against the city of Danville, in an action for damages for personal injuries.

Lipford, whom we shall hereinafter call the plaintiff, was employed as a laborer by the city in connection with the operation of its gas plant. His duty was to load tipple cars with coke in the basement of the gas plant, place them on an elevator, hoist them to the level of a tipple track, push them out on the tipple and dump their contents to the ground under the trestle. The trestle was some ten or twelve feet high. The track on the trestle was supported by ties laid about twenty inches apart. A walkway was provided betwen the rails by means of two thick planks nailed down lengthwise close together, filling up practically all of the space between the rails. Outside of the rails, on the projecting ends of the ties, planks about seven and a half inches wide were nailed down parallel to the rails, extending along the entire length of the trestle. The space between these planks and the outer edge of the rail varied somewhat, but at no point was it over five inches. The manager of the plant testified that the regular and usual distance was two and

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a half to three inches. These outside planks were placed there primarily as a walkway to enable employees to pass around the cars when they are dumped.

The plaintiff had been working for the city, in this same capacity, for seven or eight years. There were two branches or spurs to the trestle, however, and he had not been on the branch on which he was hurt for about six months prior to the night of the accident. At about three o'clock A. M. he was attempting to dump a car, and his foot slipped into what is designated practically throughout the testimony as "a hole" on the outside of the rail. The weight of the car threw him over, his foot was caught, and his leg was broken.

The case was tried upon an amended declaration to which there was no demurrer. The first count, and the one to which the evidence seems to have been directed, may be epitomized as an allegation of the defendant's breach of duty to furnish the plaintiff a reasonably safe place to work, in that the trestle was insufficiently lighted and contained the hole in question, which had been negligently permitted to remain there in a condition liable to result in an accident such as the one by which plaintiff was injured.

There are three assignments of error, the first being that the court erred in refusing to grant defendant a new trial on the ground that the verdict of the jury was contrary to the law and the evidence. We do not think this assignment is good. There is much in the evidence tending to show that the plaintiff's injury was due to a mere accident, without fault on the part of the defendant, but there is also evidence sufficient to sustain the finding of the jury to the contrary, and we cannot interfere with that finding.

There is evidence clearly tending to show the following facts, in addition to those above recited: That all over the trestle, at different places, the timbers had from time to time given way leaving holes and defects requiring frequent repairs; that at the point where the plaintiff fell there

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was a "crack" or opening "on the outside of the rails" where the planks were rotten or decayed; that this hole or crack was the largest one there, being "about eight inches," or an "eight inch hole in there;" and that the lights that morning were low and dim.

At the conclusion of the evidence the jury, by consent of both sides, were given a view of the premises. This, of course, could not add to the evidence, but it did place the jury in a position which enabled them to fully understand and comprehend the conditions at the time of the accident, the fact appearing that these conditions remained the same up to the time of the trial.

We do not overlook the contention of the defendant that plaintiff knew or ought to have known of the alleged defect. It is true that he was an old employee, and had worked for a long time on the trestle on which he was hurt; but he had not, as we have seen, been on it for nearly six months prior to the night on which he was hurt. He says: "I had not been on the old trestle since June 1st. (He was injured Nov. 24th). * * * we had used the new trestle up to that night. * * * I did not know the lumber was rotted out, because the trestle had been filled up (with coke dumped under it) ever since May. The lights were down low that morning. They got real dim. I don't know what was the matter with them, but they had just as good been out for that fog from the car." The "fog" he speaks of was a steam or vapor from the coke caused by water turned on it at the loading point to cool it.

Enough of the evidence has been recited to show that, if the jury disregarded the opposing evidence of the defendant, as they might within their province have done, they were warranted in finding that the defendant was negligent as charged in the declaration, and that the plaintiff is not barred from a recovery, either by contributory negligence or by assumption of the risk. In other words, upon a de-

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murrer to the evidence, as we must view it, the case is with the plaintiff.

The next assignment of error is to the action of the court in giving and refusing instructions to the jury. The instructions given and those refused will appear in full in the official report of this case. We shall content ourselves, in the main, by saying, on this branch of the controversy, that the instructions deal with familiar principles, that those which the court gave fully and fairly submitted to the jury the theory of each party, and that this assignment of error is without merit. The only instruction which we shall mention specifically is instruction "E," asked for by the defendant and refused. It is as follows:

"The court instructs the jury that the unbending test of negligence is the general usage and practice of companies using like instrumentalities, and in order to establish negligence on the part of the defendant, plaintiff must show by a preponderance of the evidence that the trestle in question was dangerous and not up to the standard established by the ordinary usage of the business."

The evidence upon which the defendant sought to avail itself of the "unbending test" to be found in the ordinary usage of the business was exceedingly meagre. If it had the right at all under the evidence to have the jury consider the practice of persons using trestles similar to the one in question here, that right was fully protected by the portion of instruction "B" given for defendant which stated "that ordinary or reasonable care is such care as other reasonably prudent companies or persons use in conducting a like business."

The remaining assignment of error is based upon the refusal of the court to exclude all evidence in relation to the ice which was shown to have formed on the surface of the trestle and on the outside plank at or near the alleged "hole." There was no mention of this ice in the declaration,

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but the motion to exclude the evidence in regard to it was not made until after the plaintiff had been fully cross-examined about it, had rested his case, and the defendant had examined the principal witness in its own behalf. Counsel then stated to the court that "in going over the declaration again" he had noticed that the ice was not mentioned, and he therefore moved the court to exclude the evidence in regard to it. The court replied that "it would hardly be proper to exclude that evidence entirely; it may go to the jury in order that the whole surrounding circumstances may be considered; but the jury will be instructed, if requested, that if they believe that the ice on the track was the proximate cause of the injury, there could be no recovery in this case." This statement by the court seems to have been made in the presence of the jury; and, in addition thereto, when all the evidence was in, the court did give the following written instruction:

"The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury they must find for the defendant."

Under these circumstances, we are of opinion that there was no error in the action of the court in this regard.

The judgment is affirmed.

Affirmed.

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Richmond.

DAVIS V. CITY OF NEWPORT NEWS.

January 11, 1917.

Absent, Prentis, J.*

1. STREETS AND HIGHWAYS—*Contract For Pavement—Guaranty.*—A contractor entered into a written contract with a city for the paving of certain streets, upon some of which there were no street cars and upon others cars were operated. The contractor guaranteed to keep the work done under his contract in good repair for a period of ten years. It appeared from the circumstances surrounding the contract that the parties had the subject of the street car tracks upon the streets upon which cars were operated in mind and contracted with reference to their sinking from use and thereby causing damage to the adjoining work guaranteed by the contractor.

   Held: That the contractor could not be excused from the performance of his guaranty, by reason of the settlement of the foundation of the street car tracks causing injury to the work guaranteed.

2. STREETS AND HIGHWAYS—*Contract For Pavement—Guaranty—Instructions.*—An instruction that the jury before they could find for the city must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant, and if due to causes over which he had no control, he was not liable therefor, was properly refused, where there was no evidence as to causes over which the contractor had no control other than those expressly covered by other instructions. Such an instruction would invite the jury to indulge in mere conjecture as to such causes.

Error to a judgment of the Circuit Court of the city of Newport News in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

J. Winston Read, for the plaintiff in error.

* Submitted before Judge Prentis took his seat.

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J. A. Massie, for the defendant in error.

HARRISON, P. delivered the opinion of the court.

In December, 1908, the plaintiff in error, J. W. Davis, entered into a written contract with the city of Newport News for paving certain streets and avenues, upon some of which there were no street car tracks, and upon others cars were operated. Specifications, form of contract and printed instructions were furnished the bidders in advance and they were required to acquaint themselves with the condition of the streets to be paved and separate bids were asked for the work to be done on streets where car-tracks were laid and on those where there were no such tracks. Attention was further called to the fact that the bids would be for paving the street exclusive of the space between the street car tracks and for a distance of two feet on each side thereof, which excluded portion of the street was to be paved by the street railway company, at the same time, and with the same materials as the other portion of the street; and that each bid should be made at a rate which would include the cost of keeping the whole work to be done under the contract in proper repair for a period of ten years. The sections of the specifications pertinent to this inquiry are as follows:

"52. The contractor shall guarantee the entire work done under this agreement for a period of ten years dating from the date of the last monthly estimate. The bonds furnished for the faithful performance of this contract will include the guaranteeing of the work as fully as any other stipulation. At the end of the guaranty period, the contractor, upon notice from city engineer, shall clean up the entire work done under these specifications so that the surface can be closely observed, said cleaning to be done by and at the expense of the contractor.

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"53. The contractor for the work herein specified, and in consideration of the prices bid and to be received therefor, guarantees that the workmanship and materials furnished under these specifications and used in said pavement, are in all respects first class and of such kind and quality that for a period of ten years from and after the completion and final acceptance thereof by the said city, the said pavement shall require no repairs, the necessity for which shall be occasioned by defects in said workmanship or material.

"If, however, during the said period, in the opinion of the council of the city of Newport News, the said pavement shall require repairs and necessity for such repairs shall, in its opinion, be occasioned by settlement of foundation, defective workmanship or materials furnished in the construction of said pavement, then such repairs on due notice being given, at any time during said period by the said city engineer to said contractor, shall promptly be made by and at the expense of the contractor."

The paving was to be of brick laid upon a sand base, with grout filler. The city accepted the bid of the plaintiff in error at $1.85 per square yard upon streets where there were no street car tracks and $1.86 per square yard upon streets occupied by such tracks.

The pertinent portion of the contract which was entered into is as follows: "In consideration of the premises, the said party of the first part agrees to pay to the said party of the second part the following prices as full compensation for furnishing all the material and labor in building and constructing, and in all respects completing the aforesaid work and appurtenances, in conformity with the plans and specifications, and to the satisfaction of the council of the city of Newport News and the city engineer and for guaranteeing and in keeping in repair the same for a period of ten years.

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"And the said party of the second part further agrees to keep all the work specified in this contract in good repair for a period of ten years after the completion and acceptance of the whole work."

It appears that within the guarantee period the work done under this contract became defective and the city, in pursuance of section 53 of the specifications, gave notice to the plaintiff in error to make repairs as contemplated in the specifications and contract. This the plaintiff in error refused to do, whereupon the city made the necessary repairs upon all of the streets at a total cost of $2,370.45: That portion of the repairs between the street car tracks and for two feet on each side thereof being made and paid for by the street railway company.

Thereupon the city brought this suit to recover of the plaintiff in error $2,370.45, the sum it had expended in making the repairs mentioned. Why, is not apparent from the record, but upon the trial there was a verdict and judgment in favor of the city for only $500, which is now before this court for review at the instance of the plaintiff in error.

Upon the trial it was the theory of the city that it was the defective construction, in that the bricks were not properly grouted so as to hold them together, whereupon some of the bricks settled from traffic, causing the paving to become uneven, defective and out of repair, and that such defects were covered by the guarantee clauses of the specifications and the contract. On the other hand the contention of the plaintiff in error was that the defects were caused by a natural expansion of the bricks, the sinking of the street car tracks and other independent causes over which he had no control.

The first assignment of error is to the action of the court in giving for the city the following instruction, No. 4:

"The court instructs the jury that the contract, plans

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and specifications between the city and J. W. Davis, for the construction of the brick pavement mentioned in the evidence, provides for it to be constructed in part upon streets in which there are street car tracks, of which fact the said Davis had notice, and bid for the work accordingly, and if the jury believe any of the defects complained of in the pavement constructed under the contract in evidence were occasioned by settlement of foundation due to the use of the street railway tracks, this fact should have been taken into consideration by the contractor, and it was his duty to repair such defects."

We are of opinion that this instruction is based upon the evidence, that it correctly interprets the contract between the parties, and that it was, therefore, properly given. The plaintiff in error submitted his bid and contracted with full knowledge that there were street car tracks upon some of the streets which he was to pave within two feet of the track, and by the terms of his contract he agreed to keep all the work specified in his contract in good repair for a period of ten years. The conditions existing at the date of the contract were well known and it is clear that the parties had the subject of the street car tracks in mind and contracted with reference to their sinking from use and thereby causing damage to the adjoining work guaranteed by the plaintiff in error.

In the case of *City of Akron* v. *Paving Co.*, 171 Fed. 29, 36, 96 C. C. A. 271, a similar case to the present, the paving company asked to be excused from the performance of the guarantee specifications of its contract for street paving, by reason of the settlement of the foundation of the street car tracks in streets upon which it had constructed pavement to within one foot of the rail. The Circuit Court of Appeals, speaking through Judge Lurton, said: "Can failure of performance of such a contract be excused on the ground that the foundations of the street car tracks were out of repair?

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We understand from the charge of the court that performance was excused to the extent that the pavement was impaired by defects in these foundations. The conditions existing at the date of the execution of the contract must be considered * * * Clearly, then, the parties had the subject of street car tracks in mind. But it nowhere appears in the contract, as we understand it, that performance of the paving company's covenant was to be excused by reason of defects existing in the track foundations during the life of the guaranty. * * * But here, again, we discover no provision in the contract which in terms would excuse the performance of the paving company's covenant of guaranty on account of any failure or neglect of the city to require the street car company to keep in repair either the paving between the rails, or the track foundations."

The evidence in the case at bar shows that the street railway tracks settled, not continuously, but in places along the street; that no charge was made against the plaintiff in error for repairing any defects in the pavement between the tracks and two feet on either side thereof. As already stated, the street car company made all of those repairs, at its own expense, regardless of how far they extended from the tracks, and there is nothing in the specifications, the contract, or the evidence, that can excuse the plaintiff in error from the performance of his guarantee to keep in repair that part of the paving covered by his contract.

The objection taken to the refusal of the court to give instruction "E," asked for by the plaintiff in error, is, in view of what has been already said, without merit. This instruction tells the jury that if they believe from the evidence that any of the alleged defects were caused by a sinking of the street car tracks, then the defendant is not liable for such defects." In disposing of the first assignment of error we have said all that is needful in answer to the proposition announced by this instruction.

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The only remaining objection taken to the action of the circuit court was to its refusal to give instruction "F," asked for by the plaintiff in error, which is as follows:

"The court instructs the jury that before they can find for the plaintiff they must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant under the terms of his contract; and if due to causes over which he had no control and for which he was not responsible by virtue of said contract, he is not liable therefor."

There was no evidence upon which to base this instruction. It invites the jury to indulge in mere conjecture as to causes over which the plaintiff in error had no control, other than the settlement of the street railway tracks which is dealt with under the first assignment of error. The only other cause suggested for the defects is that they arose from expansion of the bricks, and that subject is expressly covered by instruction "D," given for the plaintiff in error which is as follows:

"The court instructs the jury that if they believe from the evidence that the alleged defects in the pavement, or any of them, were due to expansion of the bricks, and not to settlement of foundation, defective workmanship or materials, including bricks furnished in the construction of said pavement, then the defendant cannot be held liable for any defects caused by such expansion."

The record shows that the aggregate of repairs on those streets where there were no car tracks cost considerably more than the $500 found by the jury, which would seem to leave little room for the untenable contention made with reference to the streets upon which cars were operated.

Upon the whole case, we are of opinion that the plaintiff in error has not been prejudiced by the judgment complained of, and it must, therefore, be affirmed.

Affirmed.

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Richmond.

DEAL'S ADM'R v. MERCHANTS AND MECHANICS SAVINGS BANK AND OTHERS.

January 16, 1917.

1. BANKS AND BANKING—*Relation Between Bank and Depositor.*—The relation between a bank and a depositor is that of debtor and creditor. The deposit creates an ordinary debt, not a privilege or right of a fiduciary character. It is a loan with the superadded obligation that the money is to be paid when demanded by check.
2. BANKS AND BANKING—*Joint Deposit.*—Money of M. was deposited in a bank on savings account to the credit of M. or E. *Held:* That upon the death of M. the balance of such account belonged to E.

Appeal from a decree of the Circuit Court of the city of Norfolk. Decree in favor of contestant. Complainant appeals.

Affirmed.

The opinion states the case.

Frank L. Crocker and *Winston Parrish*, for the appellant.

N. T. Green and *Baker & Eggleston*, for the appellees.

HARRISON, P., delivered the opinion of the court.

This suit was brought by the administrator of Martha S. Deal claiming a certain deposit, on savings account, in the Merchants and Mechanics Savings Bank of Norfolk. The claim was contested by Ellen C. Holland, and the circuit

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court entered a decree in favor of the contestant, from which this appeal has been taken by the complainant.

The controversy arises out of the following facts: In January, 1912, Martha S. Deal sent for a friend and requested him to deposit her money in bank, saying that she did not expect to live long and that she wanted the money to go to her sister, Ellen C. Holland, when she died. The friend told her that he could deposit the money in her name so that it would go to her sister at her death, and that it should be put on the bank book that way. In pursuance of this understanding, the money, $1,300, was deposited in the Merchants and Mechanics Savings Bank on savings account to the credit of "Martha S. Deal or Ellen C. Holland." At the time the deposit was made the receiving teller of the bank explained that the deposit was a joint account and that either of the parties named could draw the money at any time, but that it was necessary to bring the pass book to the bank. In December, 1913, less than a year after the deposit was made, Mrs. Deal died, having then drawn upon the account four times, the amount drawn aggregating $300. After Mrs. Deal's death, Mrs. Holland drew $200, which was used for paying her sister's funeral expenses, etc. The balance of the original deposit, with accrued interest, is the subject of this litigation. After Mrs. Deal's death the bank book was produced from the possession of Mrs. Holland, taken to the bank for her, and the deposit changed, by the bank, to Mrs. Holland's name alone, the bank thereby recognizing its understanding with the decedent and Mrs. Holland at the time the deposit was made. That this joint deposit was made with the understanding that the balance thereof, not checked out during the joint lives of the two depositors, was to become the property of the survivor satisfactorily appears.

We are of opinion that, under the facts of this case, the effect of the deposit by Mrs. Deal to the joint credit of her-

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self and her sister was to create a contract relation between the bank and the two joint depositors, under which the amount to the credit of the account became the property of Ellen C. Holland as the survivor of decedent and herself.

The relation between a bank and a depositor is that of debtor and creditor. The deposit creates an ordinary debt, not a privilege or right of a fiduciary character. It is a loan with the superadded obligation that the money is to be paid when demanded by check. *Wood* v. *Am. Nat. Bk.*, 100 Va. 306, 40 S. E. 931; *Pendleton* v. *Commonwealth*, 110 Va. 229, 65 S. E. 536; *Bank* v. *Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380.

Therefore, when the deposit in this case was made by Mrs. Deal for the joint benefit of herself and Mrs. Holland, in legal effect a loan was made by decedent and Mrs. Holland to the bank, and the bank was the debtor to them, and they creditors of the bank, to the amount of such deposit. It was a pure contractural relation and no question of gift or trust arises in determining the rights of the parties under such a contract.

In *Chippendale* v. *North Adams Savings Bank*, 222 Mass. 499, 111 N. E. 371, the question here involved arose, and the court, in disposing of the case, said: "The new deposit in the Hoosac Savings Bank, by its terms, was a deposit to be paid during the lives of Williams and of Mrs. Worthington, or either of them, as they should call for the deposit, or a part of it, and the balance (not withdrawn during their joint lives) was to be paid to the survivor of them. Such a contract between a depositor or depositors and the savings bank is a valid contract. If Mr. Williams had gone to the savings bank with a sum of money, he could have made such a contract with the savings bank. What took place was the equivalent of that by reason of a novation with respect to the account theretofore on deposit in Williams' name alone. The case, therefore, which we have to

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decide is not a case of an attempted gift of property, but is a case where Williams, the depositor, through a novation, had made a new contract with the savings bank by virtue of which either he or Mrs. Worthington could draw such sums as either in their discretion chose during their joint lives and the balance was to be withdrawn by and so was to belong to the survivor. In such a case there is no gift of the balance upon the death of Williams. Mrs. Worthington (when she survived Williams) became the owner of the balance undrawn, by virtue of the contract of deposit, and not by virtue of a gift which took effect on Williams' death."

In *Blick* v. *Cockins,* 252 Pa. 56, 97 Atl. 125, it is held that: "A deposit in a bank account in the joint name of husband and wife, subject to the order of either or survivor, whether made by each of them or entirely by the wife, amounts to a gift to both jointly, with right of survivorship, and on her death the deposit becomes his sole property"

As the decree complained of must be affirmed for the reasons already given, it is unnecessary to consider other grounds urged in its support.

Affirmed.

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Richmond.

DUNNAVANT v. DUNNAVANT AND OTHERS.

January 11, 1917.

1. LOST INSTRUMENTS—*Deeds—Jurisdiction of Equity.*—Where an instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. That courts of equity have jurisdiction to set up lost deeds or wills, and to establish titles under them, can certainly not be denied, but it is a dangerous jurisdiction and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised, nor except upon the clearest and most stringent proof.
2. LOST INSTRUMENTS—*Deeds—Insufficient Evidence to Establish.*—A bill was filed by a son against his father and others to establish a lost deed by the father to the son, alleged to have been executed twenty-nine years before. There was an irreconcilable conflict in the testimony of the father and son. The testimony of the alleged draughtsman of the deed was unconvincing. The other circumstances surrounding the alleged transaction were improbable.

Held: That the evidence was insufficient to show the existence of the deed.

Appeal from the Circuit Court of Henry county. Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

Whittle and *Whittle,* for the appellant.

Gravely and *Gravely,* for the appellees.

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PRENTIS, J., delivered the opinion of the court.

Richard A. Dunnavant filed his bill against Thomas W. Dunnavant, his father, and others, alleging that in November, 1885, his father conveyed to him two tracts of land in Henry county, one known as the Stacy Watkins tract, containing fifty acres, and the other as the Nancy Watkins tract, containing ninety-three acres, and that the conveyance has been lost or destroyed.

It is conceded by counsel for the appellees that the degree of proof necessary to establish a lost deed and its contents is correctly indicated in the case of *Thomas* v. *Ribble*, 2 Va. Dec. 321, 24 S. E. 241, which is relied upon by the appellant. That rule is there succinctly stated in these words: "Where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. That courts of equity have jurisdiction to set up lost deeds or wills, and to establish titles under them, can certainly not be denied, but it is a dangerous jurisdiction and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised, nor except upon the clearest and most stringent proof." This doctrine has been approved by this court in the following cases: *Barley* v. *Byrd*, 95 Va. 316, 28 S. E. 329; *Carter* v. *Wood*, 103 Va. 68, 48 S. E. 553; *Smith* v. *Lurty*, 108 Va. 800, 62 S. E. 789; *Johnson* v. *McCoy*, 112 Va. 580, 72 S. E. 123; *McLin* v. *Richmond*, 114 Va. 244, 76 S. E. 301; *Dickenson* v. *Ramsey*, 115 Va. 79 S. E. 1025.

These facts are undisputed: That Thomas W. Dunnavant acquired title to the two tracts of land involved in this controversy, the Stacy Watkins tract in 1871, and the

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Nancy Watkins tract in 1883; that at the time of the alleged conveyance, he resided upon the Stacy Watkins tract with his wife and son, Richard A. Dunnavant (the claimant of the property, then about 24 years old), his daughter, Eliza Dunnavant (then about 22 years of age, who in April, 1913, married Kellam and left her father's home), and an adopted daughter. The appellant continued to reside upon the property, pay the taxes thereon and cultivate the land as the ostensible owner thereof, until, then being over 76 years old, in May, 1914 (having been born on the 19th day of January, 1838), he left the place and moved into Martinsville. On the 18th day of July, 1914, he sold and conveyed the two tracts of land referred to, to W. T. Deshazo and F. E. Smith, for the consideration of $1,500. The purchasers were willing to pay cash, but he told them he preferred to have the interest at six per cent. upon the $1,500 well secured, and so instead of paying cash they executed their bond for the purchase money. Since 1885, from the profits derived from his lands, he has acquired title to two other tracts of land.

He testified that he left his home because he was staying there most of the time by himself, and that his son would come in now and then, but that he told him either to stay with him or leave him because he could not stay there by himself, which however is denied by the son and daughter.

The conveyance to Deshazo and Smith led to this controversy, as the appellee, Richard A. Dunnavant, claimed, as has been above stated, that in September, 1885, his father executed a deed of bargain and sale to him for the same property, which has never been recorded, and has been either lost or destroyed.

He undertakes to sustain this contention by his own testimony, the testimony of his sister, Eliza, and of W. A. Dove, the alleged draughtsman of the deed. The testimony of Richard A. Dunnavant and of his sister, Eliza Kellam,

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appears to be positive and definite to the effect that such a deed was executed in September, 1885; that the consideration therein stated was $500, but that no money passed and the real consideration was the past and future labor of the son on the farm. This deed, they say, was delivered by the father to the son, and by the son delivered to his sister for safekeeping, and she says she kept it in a trunk with other valuable papers until just before she was married and about to leave home in April, 1913, when she put it in another trunk upstairs along with other valuable papers, and, to use her own language, "locked them up, and hung the key to the trunk upstairs." It is not clear to us whether she meant that she hung the key upon the trunk containing the deed, or that she hung the key upstairs. They state that after this controversy arose they came back to the house to look for the papers and found that the trunk had been rifled, the papers scattered and that they were unable to find the deed referred to. Richard A. Dunnavant, in answer to a question asking him to explain why he let the deed remain off the records for twenty-nine years, in substance stated that he never thought anything more about it until his father left, that they all lived there as one, and that what belonged to one belonged to the other.

The testimony of W. A. Dove discloses that he was a notary public, just above twenty-one years old in September, 1885. Without indicating the date except to say that it was sometime during his term of office from 1884 to 1888, he says that he wrote a deed for Mr. Dunnavant at his (Dunnavant's) house; that he does not know who was present, but thinks Mr. Dunnavant and his family were; that Mr. Richard Dunnavant was the grantee; that he thinks the deed conveyed two tracts of land known as the Watkins tracts; that he thinks the consideration was $500; that he always wrote deeds with a general warranty of title, and does not think he deviated from this custom when he wrote

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this deed; that it was an absolute fee simple deed; that he does not know whether Mr. Thomas Dunnavant's wife signed the deed or not, that she was living at that time, but he thinks she did not sign it. In response to a question as to whether he could state by what means the two tracts of land were described in the deed, he says: "I think one of them was called the Stacy Watkins tract, I do not remember the other, further than the Watkins tract." When asked whether or not there was a seal or scroll by way of seal to the deed, he replied: "I do not remember; but I never did write one without placing it there." He says the deed was acknowledged before him as notary public and turned over to Mr. Richard Dunnavant, and that the deed was written and the acknowledgment taken at the request of Mr. Thomas Dunnavant. On cross-examination, this question and answer appear: "You could not undertake to be clear and positive as to the contents of the deed that you prepared for the Dunnavants twenty-nine years ago, could you? A. I could not, sir, except that the consideration was five hundred dollars, and I am clear on that point." He further says that it was a clear deed; that he knows of no conditions therein; that it was an absolute deed; that he thinks, but is not sure, that the deed was sealed; that he did not know that a seal was necessary; that he cannot be positive that the deed was sealed, except that it was his custom; that he is quite sure it mentioned the number of acres, but does not remember the number; that he does not remember the date of the deed; that he does not remember whether it conveyed all of the lands Mr. Thomas Dunnavant owned or not. On re-examination he was asked whether or not his recollection is clear that it conveyed two tracts of land known as the Watkins tracts, and he says: "I think that is correct, sir. It conveyed two tracts of land, known as the Watkins tracts of land."

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Upon the other hand Thomas W. Dunnavant denies in the most positive and definite way that he ever executed such a deed, and explicitly denies each and all of the material facts and circumstances testified to by the three witnesses above referred to, introduced to sustain the claim of his son.

It appears from the testimony of Dr. J. Beverly Deshazo, that in a conversation he had with Richard A. Dunnavant, he asked him if he had any claim or any papers to prevent his father from deeding any of his land away, and he was told by him that he did not, and that he expected his father to go through all his property; and it also appears from the testimony of this witness that Thomas W. Dunnavant shortly before this time had a will properly executed in which the property in controversy was devised to the appellee for life and then to his adopted daughter, Mrs. Roberts, which he learned had been destroyed.

There are other collateral facts adduced in evidence by both parties to the controversy, and other conflicting testimony, but the above we regard as the pertinent and controlling evidence in the case.

So that there is an irreconcilable conflict in the testimony of the parties interested, the unconvincing testimony of the alleged draughtsman of the deed, and no circumstance corroborating the claim of the appellee, upon whom the burden of proof rests.

A fair consideration of this testimony falls very far short of convincing the impartial mind either of the existence or contents of the deed in question. It may be fairly said that it leaves the mind in a state of doubt and uncertainty. The improbabilities of the transaction, however, are very great indeed, for no sufficient explanation is given of the silence of Richard A. Dunnavant and his sister as to the deed and his claim of ownership thereunder until they heard that their father had sold, or was about to sell, the property, and no sufficient motive is assigned for the preference of the

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son by his father in 1885, at the time the alleged conveyance was made. It then constituted the entire real estate of the father. At that time his mother and single sister were living and his father was in the prime of life. Another improbability is that a paper so valuable should have been hidden away for twenty-nine years and be finally left in a trunk with the key apparently accessible to any one who desired to take possession of it.

The law requires, in such cases, that the proof shall be strong and conclusive, as to the former existence of the paper as well as of its loss and its contents, and we are of opinion that the proof in this case is weak, uncertain, improbable and inconclusive; and, therefore, that the decree of the court below is erroneous and must be reversed, and this court will enter a decree dismissing the bill.

Reversed.

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Syllabus.

Richmond.

FOREST VIEW LAND COMPANY, INC., v. ATLANTIC COAST LINE RAILROAD COMPANY.

January 11, 1917.

Absent, Prentis, J.*

1. CROSSINGS—*Eminent Domain.*—A railroad in converting a grade crossing over a county road into an overhead or bridge crossing made embankments on the side of the road for some distance back from the bridge, and the location of the county road itself, at that point, was shifted some fifty feet further north, so that a thirty-acre tract of the plaintiff was entirely cut off by reason of the embankment, and by reason of an intervening strip of land, from access to the road. In constructing the overhead crossing and in making the slight alteration of the location, to straighten the road at the crossing, the railroad company acted under the authority and with the approval of the board of supervisors, pursuant to the provisions of section 1294-b, clause 3, of the Code of Virginia, which provides for a change in the location of a county road to avoid the necessity of any crossing, or frequent crossings. It was contended by plaintiff that as no crossing was in fact avoided, the aforesaid section did not apply.

   Held, however, in view of the declaration of policy of the State against grade crossings (Code, section 1294-d, clause 38), that the change made came well within the meaning of the section.

2. DEEDS—*Construction.*—Under familiar and settled rules of construction, the court should look to the purpose of the conveyance as disclosed not only by its terms, but by the surrounding circumstances and the situation of the parties, and should resolve any doubt against the grantor.

3. EMINENT DOMAIN—*Release of Damages.*—A deed from plaintiff's predecessors in title to the defendant company, of additional strips of land, for which the consideration paid was materially in excess of the market value at that time, contained the following provision: "All such damages to the remainder of the

* Submitted before Judge Prentis took his seat.

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tract of land of the parties of the first part by the construction of a railroad or railroad works on the land hereby conveyed as could be recovered in condemnation proceedings under the statutes are contained in the consideration for this conveyance and are hereby released."

Held: That the change in the location and the building of the bridge, referred to above, must be regarded as incident to the construction of railroad works on the land conveyed, and the damages therefrom, if any, to the residue of the tract, would have been recoverable under condemnation proceedings and were therefore barred by the release executed by plaintiff's predecessors.

4. DEEDS—*Construction*—*"On"*.—The word "on" does not always or necessarily imply actual contact, and is not infrequently used to designate nearness in place or situation. Structures are often described as being on a street, or on a road, or on a stream, when in fact they do not physically touch the street, road, or stream.

Error to a judgment of the Circuit Court of Chesterfield county in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Smith & Gordon and *Jas. F. Minor,* for the plaintiff in error.

William B. McIlwaine and *E. P. Cox,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

This action was brought by the Forest View Land Company against the Atlantic Coast Line Railroad Company to recover damages for an alleged taking of and damage to certain land belonging to the former company. There was a verdict for the defendant, and to a judgment by the trial court in accordance therewith the plaintiff obtained this writ of error.

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The grievance complained of in the declaration was based upon certain changes in the grade of the defendant company's roadbed adjacent to the land involved, and also upon certain changes in the location and grades of two county roads known, respectively, as the Bon Air road and the River road, upon each of which the land abutted. In the course of the proceedings, however, the controversy has narrowed itself, as we understand the record, to the single question of the plaintiff's right to recover for a change in the location and grade of the River road.

The portion of the plaintiff's land directly affected by the changes thus complained of is a tract containing about 30 acres, bounded on the east, for 1925 feet, by the railroad right of way, on the south for more than half that distance by the Bon Air road, on the west and northwest, for 2437 feet, by other lands, and on the north for a distance of 38 feet by what was formerly and until changed by the defendant company, the south line of the River road. It will not be necessary for the purposes of this discussion to deal with the balance of plaintiff's land. This 30-acre tract, as may be inferred from the foregoing general description, lay mostly toward the Bon Air road, upon which it had an extensive frontage. On the side next to the River road it ran out to a narrow point, ending with 38 feet of frontage on the River road. There was no roadway over this point connecting the tract with the River road, and although such a connection could have been established, the character and condition of the land was not well adapted to that purpose. The Bon Air and River roads form a junction not far to the east of this land, thus giving the entire tract access to both.

The right of way through or along this property was originally acquired, and the railroad was originally built, in 1889. At that time the railroad crossed the Bon Air road at the south of the 30-acre tract and the River road at the north, not exactly at grade, but by what are usually called

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"grade crossings." The tracks along this land and at these crossings are a part of a belt line, running around and to the west of the city of Richmond, forming a connection with the defendant company's main line south of the city. This connection was originally made in 1889, at Clopton, a station about three miles south of Richmond. In 1906, the defendant company planned some very extensive changes and improvements of this belt line, involving an increase of its tracks, a widening of its right of way, an extension of the line to a meeting point with the main line some three miles further south at Falling creek, an entire change of grades throughout, and the substitution of an overhead crossing or bridge instead of a grade crossing of the tracks at the River road. To this end, the company acquired, by deed dated August 23, 1906, from Eliza H. Schutte and her husband (the then owners of the property here involved), two additional strips of land adjoining the old right of way, one of which is approximately 60 feet wide, and, extending the entire distance between the Bon Air and the River roads, forms the eastern boundary of the above described 30-acre tract. The deed conveying these additional strips of land, for which the consideration paid was materially in excess of the market value at that time, contained the following provision: "All such damages to the remainder of the tract of land of the parties of the first part by the construction of a railroad or railroad works on the land hereby conveyed as could be recovered in condemnation proceedings under the statutes are contained in the consideration for this conveyance and are hereby released."

The plan for the readjustment, reconstruction and improvement of the belt line, which the evidence shows was in contemplation at or about the time when the deed was obtained, was not put into effect until the spring of 1912, about one year after the land alleged to be damaged thereby had been acquired by the plaintiff company. This delay is

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not otherwise explained than by the suggestion of counsel that it was due to "the historical fact that in the fall of 1906, the winter of 1907 and for several years following, this country passed through times of great financial depression, and that individuals as well as public service corporations were required to exercise the strictest economy and to husband all their resources." This explanation seems entirely plausible, but whatever may have been the reason, nothing is disclosed whereby the delay may be held to have prejudiced the rights of the defendant company under its deed from Mr. and Mrs. Schutte.

Recurring now to the plaintiff's claim for damages, and to a more minute consideration of the complaint upon which, as finally reduced, its demand rests, we find the exact things complained of to be that in converting the grade crossing at the River road into an overhead or bridge crossing, embankments were made on the sides of the road for some distance back from the bridge, and that the location of the county road itself at that point was shifted some fifty feet further north, so that the thirty-acre tract is now entirely cut off, both by reason of the embankment and by reason of an intervening strip of land, from access to the River road. This, upon a careful analysis of the record, as it comes to us, is the whole of the plaintiff's case. Can it be maintained?

In constructing the overhead crossing and in making the slight alteration of the location (to straighten the road at the crossing), the defendant company acted under the authority and with the approval of the board of supervisors of the county, duly obtained pursuant to the provisions of section 1294-b, clause 3, of the Code of Virginia, which, so far as it need be quoted here, is as follows:

"If any railroad, canal, turnpike, or other public service corporation deems it necessary in the construction of its works to cross any other railroad, canal, turnpike, or works

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of any other public service corporation, or any county road, it may do so; provided * * * If such company desires that the course of any other railroad, turnpike, canal, or other works shall be changed to avoid the necessity of any crossing, or frequent crossings of the same, the change may be made in such manner and on such terms as may be agreed on by the company desiring the change, and the company, person, or county owning or having charge of the works to be affected by such change. If any such crossing or change as is provided in this section cause damage to the works of any company, or of any county, or to the owner or occupant of any lands, the company exercising the privileges herein granted shall make proper compensation for such damage * * * but any county road, or stream, or water course, may be altered by any such company for the purposes aforesaid whenever it shall have made an equally convenient road or waterway in lieu thereof, the said company having first obtained the consent of the board of supervisors of the county to the alteration of any road or highway." (See in this connection *C. C. & O. R. Co.* v. *Board of Sup. Scott Co.*, 109 Va. 34, 38, 63 S. E. 412, *et seq.*

Counsel for the plaintiff contend that the foregoing section does not apply to the change made in the instant case, because, as they claim, no crossing was in fact avoided. We cannot accede to this view. It is true that the road still crosses the tracks at practically the same point as formerly, but the grade crossing is avoided, and, recalling the solemnly declared policy of this State against grade crossings (Code, sec. 1294-d, clause 38), we have no difficulty in holding that the change here made comes well within the meaning of the statute.

And with reference to the further contention of the plaintiff, that if the above section 1294-b (3) does "*purport* to authorize such changes as were made here, and in the mode

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adopted without notice or hearing, the requirements of due process of law and just compensation were not obeyed," it is only necessary to say that, as will hereafter more fully appear, we regard the release above quoted as fully covering any compensation which the plaintiff might otherwise have demanded, and, therefore, the question of notice and due process of law does not arise.

A great deal of testimony was introduced at the trial, *pro* and *con*, relating to the alleged damage to the land. It was earnestly contended on behalf of the defendant that the plaintiff had in fact sustained no damage; and, if the case had come to us merely upon the sufficiency of the evidence to sustain the verdict for the defendant, we could very promptly and very properly affirm the judgment, with the simple comment that the verdict, to say the least of it, was not without abundant evidence to support it. The determinative question, however, presented by this writ of error involves the propriety and correctness of an instruction by which the trial court directed a verdict and ended the case in favor of the defendant. That instruction was as follows:

"The court instructs the jury that all the elements of damage claimed by the plaintiff in this case could be recovered in condemnation proceedings under the statutes of the State of Virginia, and as Eliza Schutte and Henry R. Schutte, her husband, the predecessors in title of the plaintiff, did receive payment for all such damage from the Atlantic Coast Line Railroad Company, and did release the same to the said company in a certain deed dated the 23rd day of August, 1906, introduced in evidence, the jury must find a verdict for the defendant."

It was the duty of the court to construe the release, and we are of opinion that this instruction embodied a correct interpretation thereof, and was, therefore, properly given.

It is not easy to conceive of a more comprehensive and far-reaching acquittance than the one in question; but if

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we concede that there is doubt as to its application to the exact damages here claimed, then, under familiar and settled rules of construction, the court should look to the purpose of the conveyance as disclosed not only by its terms, but by the surrounding circumstances and the situation of the parties, and should resolve the doubt against the grantor. (2 Dev. on Deeds, 3rd ed., sec. 839, 848). In the present instance, as we have seen, it is reasonably clear from the evidence that substantially the same changes which were made at the River road crossing, as a part of "a comprehensive and unified scheme" for reducing grades and double-tracking the roadway from James river to Falling creek, were under contemplation at the date of the execution of the deed from Eliza and Henry Schutte. It does not affirmatively appear that these grantors actually knew of this scheme. Mr. Schutte, himself, who was examined as a witness for the plaintiff, was not interrogated as to their knowledge of these plans of the defendant at the time of the conveyance, and he made no statement upon the subject. But even if they did not actually know of the company's purpose, they must now be charged with notice of it. The railroad was already built through their land, upon a right of way acquired in 1889. They were paid a large price for the additional strip of land, and it is certain that damages of some kind to the residue of the tract were in the minds of the parties. What damages, if not those which the plaintiff is now seeking to recover? At all events, Mr. and Mrs. Schutte were paid for and executed a sweeping release, and their vendees are precluded from claiming compensation for any damage which falls within the fair interpretation of the language used to express the exemption.

It must be apparent that if the railroad company, instead of taking the deed from the owners of the land, had proceeded to acquire by condemnation proceeding the requisite additional strip together with the right to change the grades, shift the location of the crossing, construct the

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overhead bridge, etc., it would of necessity have taken a course which would have brought under consideration for compensation the very elements of damage embraced in the plaintiff's demand. It could not have prosecuuted the "condemnation proceedings under the statutes" designated in the release without disclosing in advance, and as a matter of public record, "the cuts and fills, trestles and bridges" in contemplation, together with much other information, informing the property owner of the exact manner and extent to which his estate would be affected. (Code, sec. 1105-f (4); *Lanford* v. *Va. A. L. R. Co.*, 113 Va. 68, 71, 73 S. E. 566. Whether Mr. and Mrs. Schutte had all this information when they made the deed, we cannot say, but they at least saw fit to sell the land at a price which they stated over their hands and seals embraced "all such damages to the residue of the tract * * * by the construction of a railroad or railroad works on the land hereby conveyed as could be recovered in condemnation proceedings under the statutes;" and it seems to us clear that what the defendant company is charged with doing in this case must be regarded as incident to the construction of "railroad works" on the land conveyed, and the damage therefrom, if any, to the residue of the tract, such as would have been recoverable under condemnation proceedings. The bridge at the crossing was built and is maintained, as the law in such cases requires, by the railroad company.

In the case of *City of Richmond* v. *R. & D. R. Co.*, 21 Gratt. (62 Va.) 604, 608, Judge Staples, speaking for this court, said: "The word 'works' is one of very extensive signification. In military engineering, it means fortresses, fortifications, ramparts, bastions and the like. In civil engineering it is often applied to depots, engine-houses, bridges, embankments and other structures essential to the franchise and the proper conduct of a railway, or other work of public improvement."

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In *Parker* v. *Boston &c. R. Co.*, 3 Cush. (Mass.) 107, 116, 50 Am. Dec. 709, Chief Justice Shaw, referring to a statute regulating the exercise of the right of eminent domain, said: "All these provisions are parts of the act, to be taken and construed together as one system of rules; and hence it appears that the raising of a common road, with an embankment of sufficient length on each side to form an easy slope to a high bridge, is a part of the franchise given by the charter, as much as the right to take private property or to pass over navigable waters. These bridges and the embankments extending laterally from them, are as much a part of the structure authorized by the charter as the railroad itself. This brings the case of one damnified by such structure within all the reasons and within all the provisions which give compensation for damages occasioned by the laying out, making and maintaining of the railroad."

The plaintiff contends, however, that it is not claiming against the release, and insists that the damages sued for are not covered thereby, because the location of the county road was shifted and the bridge actually built a few feet north of the road as originally located, so that there was not any actual physical contact of the structure with the strip conveyed, and hence no railroad works *"on the land."* If it be conceded that no part of the embankment and approach to the bridge on the west side of the track actually touches the strip conveyed to the defendant—a fact not shown clearly, if at all, by the record—the meaning sought to be ascribed to the word "on" is too restricted. Bearing in mind the rule already alluded to, by which the words in the deed must be taken most strongly against the grantor, it is entirely consonant with both reason and authority to accord to the words "on the land" the precise meaning claimed for them by the defendant and attributed to them by the trial court. The word "on" does not always or necessarily imply actual contact, and is not infrequently used to

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designate nearness in place or situation. Structures are often described as being on a street, or on a road, or on a stream, when in fact they do not physically touch the street, road or stream. This latitude in the use of the word is recognized in law. See 29 Cyc. 1484; *O'Mara* v. *Jensma,* 143 Iowa, 297, 121 N. W. 518, 519; *Burnam* v. *Banks,* 45 Mo. 349, 351; 6 Words & Phrases, p. 4963.

There is no error in the judgment complained of and it is affirmed.

Affirmed.

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Richmond.

FRANCIS AND OTHERS v. TAZEWELL AND OTHERS.

January 11, 1917.

1. SLAVES—*Legitimacy of Children—Annulment of Marriage.*—The act of February 27, 1866, Code of 1904, section 2227, declared that: "Where colored persons prior to February 27, 1866, agreed to occupy the relation * * * of husband and wife, and were cohabiting together * * * at that date, whether the rites of marriage had been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner, as if they had lawfully married; and all their children shall be deemed legitimate, whether born before or after said date. And where the parties had ceased to cohabit before February 27, 1866, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate." Under these provisions, where a man and woman, both slaves, agreed to occupy the relation to each other of husband and wife and in pursuance of that agreement cohabited together prior to February 27, 1866, the subsequent abandonment after the passage of the act, of the woman by the man for unfaithfulness could neither dissolve the marriage nor affect the legitimacy of the children of the marriage.
2. SLAVES—*Legitimacy of Children—Annulment of Marriage.*—Neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children.
3. SLAVES—*Act of February 27, 1866—Concubinage.*—The statute does not apply to cases where the cohabitation is a purely meretricious connection. There must have been a *bona fide* agreement, express or implied, between the parties to live together as man and wife.

Appeal from a decree of the Circuit Court of Northampton county. Decree for the defendants. Complainants appeal.

Affirmed.

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The opinion states the case.

Otho F. Mears, for the appellants.

Thos. H. Nottingham and *J. T. Wilkins, III,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

This is a controversy over the estate of Benjamin Tazewell, deceased, between appellants, a brother and sister, and the children of a deceased sister of decedent, plaintiffs, and appellees, Thoroughgood Tazewell, the son, and the children of Cora Winder, deceased, who was the daughter of decedent, defendants.

The parties are negroes, and the son and daughter of decedent were the offspring of what is claimed to have been a legalized marriage between him and Emily Smaugh, by virtue of an act of the General Assembly passed February 27, 1866.

The question of heirship was referred to a commissioner in chancery, whose finding in favor of the legitimacy of the children was approved and confirmed by the court. From a decree awarding the property to the defendants the plaintiffs appealed.

The act in question (now section 2227 of the Code) declares that, "Where colored persons prior to February 27, 1866, agreed to occupy the relation * * *of husband and wife, and were cohabiting together * * * at that date, whether the rites of marriage had been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner, as if they had lawfully married; and all their children shall be deemed legitimate, whether born before or

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after said date. And where the parties ceased to cohabit before February 27, 1866, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate.".

This legislation was rendered necessary to meet the abnormal condition that existed among the colored race in consequence of the abolition of negro slavery in the South as a result of the Civil War.

Without this enabling act, slave-marriages which largely obtained among that class of the population were invalid, because, being slaves, the parties were incapable to make any contract, including that of marriage. When, therefore, these former slaves were emancipated and clothed with the rights and privileges of citizenship, the good order of society demanded that these inchoate marriages should be recognized as lawful and the children legitimated. And the right of children of slave-marriages to inherit property from the father was regarded of sufficient consequence to be expressly secured both by the Constitutions of 1869 and of 1902 (Constitution of Virginia, 1869, sec. 9, Art. &I; and sec. 195, Art. XIV, of the present Constitution).

The evidence justified the conclusion reached by the commissioner and the circuit court, that Benjamin Tazewell and Emily Smaugh (both of whom were slaves) agreed to occupy the relation to each other of husband and wife, and in pursuance of that agreement cohabited together prior to February 27, 1866; that the appellee, Thoroughgood Tazewell and Cora Winder were the children of that union, and were always acknowledged by Benjamin Tazewell as his children.

Subsequently, in the year 1863, Benjamin Tazewell left his home in Northampton county and enlisted as a soldier in the Federal army. Upon his return from the army, in July, 1866, he sought his wife and children; but discover-

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ing that the wife was *enciente* by another man, he abandoned her, and in December following married another woman. He took his two children to his home to live with him, and nurtured and maintained them until they were old enough to provide for themselves, and always regarded them as his own children.

In these circumstances, appellants insist that the conduct of Benjamin Tazewell and the woman, Emily, after his return from the army amounted to a mutual abandonment of their former relations, and that their children are not within the protection of the statute and are illegitimate.

This contention is utterly untenable. Having once reached the conclusion that Benjamin Tazewell and Emily Smaugh were lawfully married within the contemplation of the act of February, 1866, it is obvious that neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children.

Section 2554 of the Code prescribes that, "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

The case of *Francis* v. *Francis*, 31 Gratt. (72 Va.) 283, 289, is conclusive authority for affirming the decree under review. Judge Staples, in delivering the opinion of the court in that case, at page 289, observes: "My opinion, therefore, is that the circuit court did not err in holding that the appellee was, under the act of February, 1866, the lawful wife of the appellant at and after the passage of that act, and the appellant could no more release himself of the duties and obligations of that position by any act of his than he could if he had been legally united to the appellee

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by the rites of matrimony." See also *Fitchett and others* v. *Smith's Admr., &c.*, 78 Va. 524; and *Smith* v. *Perry, Admr., &c.*, 80 Va. 563.

The case of *Patterson* v. *Bingham*, 101 Va. 372, 43 S. E. 609, is relied on to reverse the decree. But there, upon the facts, the court was of opinion that it was not a case of intended marriage within the meaning of the act, but of concubinage merely. Of course, the statute does not apply to cases where the cohabitation is a purely meretricious connection. There must have been a *bona fide* agreement, express or implied, between the parties to live together as man and wife.

The decree is plainly right and must be affirmed.

Affirmed.

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Richmond.

HOLLAND AND OTHERS v. VAUGHAN AND OTHERS.

January 11, 1917.

1. REFORMATION OF INSTRUMENTS—*Jurisdiction of Equity.*—The jurisdiction of a court of equity to reform written instruments is well settled.
2. REFORMATION OF INSTRUMENTS—*General Rule.*—While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Such mistake may be shown by parol, but the evidence of it must be clear and convincing, and such as to leave no fair and reasonable doubt upon the mind that the writing does not correctly embody the intention of the parties.
3. INTERPRETATION AND CONSTRUCTION—*Construction by the Parties.*—No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves.

Appeal from a decree of the Circuit Court of the city of Portsmouth. Decree for the defendant. Complainants appeal.

Reversed.

The opinion states the case.

J. N. Sebrell, Jr., and *R. H. Rawles*, for the appellants.

James H. Corbitt, for the appellees.

PRENTIS, J., delivered the opinion of the court.

The appellees, E. M. Vaughan and T. E. Vaughan, her husband, by deed dated the 2nd day of June, 1903, conveyed certain lands to Charles Keller. The appellants, E. E. Holland, to whom the property had been since conveyed, and Charles Keller and Amanda Keller, his predecessors in title,

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filed their bill on the 9th day of February, 1912, alleging that by mutual mistake of the parties that deed contains an imperfect description of the property intended to be conveyed thereby, and praying that it be so reformed as properly to express its true intent, purpose and meaning.

The deed described the property as, "containing seventy-five acres, more or less, and bounded and described as follows, to-wit: Situated near Kilby station, in Nansemond county, Virginia, and bounded on the west by the Norfolk and Western Railroad, on the south by the said railroad and the land of E. E. Holland, on the east by the lands of E. E. Holland and others, and on the north by the Seaboard Railroad, it being the same land conveyed to E. M. Norfleet (now E. M. Vaughan) by her husband, E. A. Norfleet, by deed duly recorded in the clerk's office of Nansemond county, and also by deed executed by E. E. Holland and wife and recorded in the clerk's office of Nansemond county court, in D. B. No. 34, page 162, and also a part of the old Bottiger place conveyed to E. M. Norfleet by D. F. Parker by deed duly recorded in the clerk's office of Nansemond county court in D. B. No. 50, page 667."

The error alleged is that in the recital of the sources of title to the grantors the draughtsman of the deed inadvertently omitted to refer to a deed from Vallie Harrison and Lydia Harrison, his wife, dated and recorded the 24th day of September, 1892, which conveyed ten acres of land, and which will be hereinafter referred to as the Vallie Harrison tract.

The question, then, to be determined is whether the deed from E. M. Vaughan and T. E. Vaughan, her husband, to Charles Keller, dated the 2nd day of June, 1903, should be reformed so as clearly to include this Vallie Harrison tract.

After the conveyance to Charles Keller in 1903, he took possession of the Vallie Harrison tract, along with the three other parcels of land specifically referred to, the four tracts being contiguous, and he, and those claiming under

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him, have held possession of the entire property ever since that time.

When E. E. Holland, in 1911, determined to buy the land from Amanda Keller, he discovered that the original deed from Vaughan and husband to Charles Keller failed to refer to the deed from Vallie Harrison and wife as one of the sources of title. He thereupon asked Mrs. Vaughan and her husband to correct the alleged mistake in the original deed from them to Keller by uniting in Keller's deed to him. They declined to accede to his request, and this litigation is the result.

The following facts, tending to establish the mutual mistake complained of, appear: The land referred to was in 1903, at the time of the conveyance, charged upon the land books for taxation to Ella M. Norfleet (who is now the appellee, Ella M. Vaughan), in four separate parcels, aggregating 71½ acres, one of these parcels being the Vallie Harrison tract of 10 acres. The four tracts were contiguous, and without the Vallie Harrison tract the area of the other three tracts is only 60 acres, though the deed purports to convey 75 acres, more or less. Immediately after the conveyance to Keller in 1903, he claimed the Vallie Harrison tract of land, and he and his successors have since then collected rent for it, have fenced and improved it, and ever since that time have paid taxes on it. It was transferred on the land books by the commissioner of the revenue to Keller in 1904, and has not been charged to Mrs. Vaughan since 1903, and she has paid no taxes thereon since that year.

The circumstances attending the sale were, that Mrs. Vaughan had removed from the land after the death of her first husband, a Mr. Norfleet, and went to live with her brother two or three miles away. She married her present husband, Mr. Vaughan, and moved to the city of Portsmouth, in November, 1902, before the execution of their deed to Keller in June, 1903, and has lived in Portsmouth

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ever since. She placed her property in the hands of Mr. S. E. Everett, an attorney-at-law of Suffolk, for sale. He offered it for sale at public auction on the 30th day of May, 1903, but failed to secure a satisfactory bid. A few weeks later, by telephone, she received through her attorney, Mr. Everett, an offer of the sum of $2,000 from Mr. Keller, which she accepted.

Mr. and Mrs. Vaughan testified that they did not intend to include the Vallie Harrison tract, but the testimony of her agents, the auctioneer, Mr. Hosier, and her attorney, Mr. Everett, is to the effect that no reservation of any part of her land was mentioned to them, and the attorney, Everett, testifies that he thought that he was authorized to sell all of Mrs. Vaughan's land at or near Kilby station, and that he intended to draw the deed so as to include all of her property there.

The jurisdiction of a court of equity to reform written instruments is so well settled that we do not deem it necessary to sustain the doctrine by the citation of authorities.

The syllabus in the case of *Beach* v. *Bellwood*, 104 Va. 170, 51 S. E. 184, states the rule thus: "While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Such mistake may be shown by parol, but the evidence of it must be clear and convincing, and such as to leave no fair and reasonable doubt upon the mind that the writing does not correctly embody the intention of the parties."

Applying that rule to this case, our conclusion is, that the mutual mistake is sufficiently proved. The deed under consideration itself states that the land conveyed is bounded

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on the north by the Seaboard Railroad. There is a narrow strip of unenclosed land five feet in width and about nine hundred feet in length, belonging to H. B. Phillips, which constituted the entire northern boundary of the Vallie Harrison tract, which lies between it and the right of way of the Seaboard Air Line Railway, and it appears that the draftsman of the deed did not then know that this narrow strip of land was the true northern boundary of the property. To the casual observer, however, it appeared that the right of way of the railway company was the northern boundary of the Vallie Harrison tract. It is difficult to understand why this boundary was given if the deed was not intended to include the tract in controversy, because the only other place where any of the property conveyed touches the right of way of the Seaboard Railroad is in the extreme northwestern corner of the property where another parcel, not the Vallie Harrison tract, does touch the right of way, say for a distance of about two hundred feet.

No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves; and the evidence is conclusive that from June 2, 1903, the date of her deed, until Mrs. Vaughan was requested by Mr. Holland to correct the alleged mistake by uniting in the deed from Keller and wife to him in February, 1911, she made no claim whatever to the Vallie Harrison tract. That Keller construed her deed as conveying the land involved is abundantly proven by his having taken and held undisputed possession of it during all that period.

Upon the whole case, we have no doubt that there was a mutual mistake participated in by both parties, and that the appellants are entitled to the relief which they pray for. The decree will, therefore, be reversed, and the lower court will be directed to grant the prayer of the bill.

Reversed.

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Syllabus.

Richmond.

INGE AND OTHERS V. INGE AND OTHERS.

January 11, 1917.

1. REFORMATION OF INSTRUMENTS—*Mistake.*—A suit in equity was brought to correct an alleged mistake whereby, in the deeds carrying out a certain partition agreement, a tract of land was conveyed to a daughter instead of to her mother. The evidence showed that the three parties concerned in the partition, the mother and her two children, deliberately and understandingly intended to divide the real estate, the property of their deceased husband and father, in such a way that the mother would receive a conveyance in fee simple for the tract of land in question, and that it was conveyed to her daughter by mistake. This being true, it is unnecessary to speculate in regard to the reasons which may have led the two children to agree upon a partition which apparently gave their mother a higher and more valuable estate than her dower interest would have entitled her to receive. The natural presumption that in such a partition the widow would get no land in fee simple must, of course, yield to affirmative proof to the contrary. In the case at bar there is such proof, it is clear and convincing; and the deed must be reformed accordingly.
2. REFORMATION OF INSTRUMENTS—*Mistake—Laches—Burden of Proof.*—In a suit to reform a deed for mistake, where the defendant admits the mistake, the burden of proof of showing laches, acquiescence or ratification, by which complainant had lost her right to equitable relief, is upon defendant, and in carrying this burden defendant must do more than merely prove ambiguous and equivocal conduct and statements on the part of the complainant.
3. REFORMATION OF INSTRUMENTS—*Mistake—Estoppel.*—In this case it appeared that defendant had given a deed of trust on the tract of land after complainant had declined an offer of reconveyance. It was contended that thereby defendant had been placed in a worse position than she would have otherwise occupied, and that therefore the complainant was estopped from asserting her right to the land. It appeared that the money secured by this deed of trust was borrowed for a third party, and that defendant was secured collaterally, and was besides able to pay off the debt.

Held: That complainant was not estopped.

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4. REFORMATION OF INSTRUMENTS—*Mistake—Laches—Insanity.*—Scarcely a year elapsed after complainant learned of the mistake until she became ill and mentally incompetent to protect her interests, and remained so practically all the time until shortly before this suit was brought.

   Held: To preclude the doctrine of laches.

5. LACHES.—Whenever the delay fairly justifies the inference of acquiescence in the adverse claim, or whenever it has been of such a character as to induce other persons to alter their circumstances or conduct, so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar.

6. MORTGAGES AND DEEDS OF TRUST—*Insanity.*—Where it is shown that the grantor was generally insane during a certain period, and a lucid interval is claimed at a particular time during that period, the burden of proof is on the party alleging such lucid interval to show sanity at that particular time.

7. MORTGAGES AND DEEDS OF TRUST—*Trustee.*—Where a married woman makes a deed of trust conveying her property in trust for her support, and selects a competent and trustworthy man as trustee, her selection will not be disturbed, although her husband and daughter would prefer a member of the family as trustee who would act without compensation.

Appeal from a decree of the Circuit Court of Sussex county. Decree for the complainant. Defendant appeals.

Affirmed.

The opinion states the case.

W. S. McNeill and *T. Freeman Epes,* for the appellants

Thomas H. Howerton and *R. H. Mann,* for the appellees.

KELLY, J., delivered the opinion of the court.

This was a suit in equity brought by Helen N. Inge against her husband, S. T. Inge, and her daughter, S. H. Inge, the main objects of the suit being to set aside a deed

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of trust which she had executed to her husband, and to correct an alleged mistake whereby, in the deeds carrying out a certain partition agreement, a tract of land known as the "Cox place" was conveyed to her daughter when it should have been conveyed to herself.

The complainant, Mrs. Helen N. Inge, was twice married. Her first husband, B. R. Birdsong, died intestate in the year 1908, leaving by that marriage a son, J. L. Birdsong, and a daughter, Sallie H. Birdsong, and leaving also a considerable estate. Shortly after the death of her first husband, she and her son and daughter, acting under the advice of relations, agreed upon a partition of the real estate. The method by which this partition was accomplished is thus stated by the witness, F. L. Birdsong, a brother of her first husband: "After they had agreed to divide the land as we had recommended, or suggested, I got the deeds (meaning the original deeds to B. R. Birdsong), put them in three parcels or bundles, and labeled one bundle to Helen N. Birdsong, one for J. L. Birdsong, and one for Sallie H. Birdsong, and wrapped a piece of paper around them and labelled them, brought them to Judge Arnold and instructed him to write deeds deeding to each one the respective bundles as handed him." It further appears that the original deed for the Cox place was in Helen N. Birdsong's bundle, and that by mistake the draftsman of the partition deeds included it in the conveyance to Sallie H. Birdsong.

Very soon after this partition was made, during the year 1909, and in the order now to be named, J. L. Birdsong married Miss Inge, a daughter of S. T. Inge, who was then a widower, Sallie H. Birdsong married J. T. Inge, his son, and the widow, Helen N. Birdsong, married the widower, S. T. Inge.

On the 11th of March, 1913, Helen N. Inge executed and delivered to her husband a deed conveying to him her property, with very full powers of management and disposition,

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but in trust for certain purposes therein named, the chief of which were his and her support. From the date of her marriage until September, 1914, she resided with her husband in Lunenburg county, and then left him and went to the home of her brother at Waverly, in Sussex county, where she has since made her home. Soon after going there, she instituted this suit.

On the 25th of September, 1914, S. T. Inge, in his own right and as trustee, executed a deed releasing and reconveying to his wife the same property which she had conveyed to him, except such as he had in the meantime disposed of as trustee. There is some question as to whether this release deed was ever legally delivered. It was, however, turned over to her counsel and was admitted to record on November 30, 1914, along with a new trust deed, dated November 18, 1914, from Helen N. Inge to C. E. Smith, trustee. The new deed of trust conveyed to Smith, trustee, the property embraced in the release deed. The powers of the trustee under this second deed of trust were more restricted and the control of Mrs. Inge over the property better provided for than in the one previously executed to her husband.

Both the release deed and the second deed of trust were executed after the bill of complaint in this case was filed, but before appearance by the defendants; and both were assailed in a cross-bill subsequently filed by S. T. Inge.

The cause was duly matured and heard upon the pleadings and upon a volume of testimony (the further details of which, so far as essential, will hereafter appear); and the circuit court held that Helen N. Inge was insane and mentally incompetent to make the deed of March 11, 1913, to her husband; that the release deed was valid and binding; that on November 18, 1914, when Mrs. Inge executed the deed of trust to C. E. Smith, she was of sound mind; and that the Cox place had been allotted to her, and, by mistake,

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had been included in the deed to her daughter, Sallie H. Inge. A decree was entered accordingly whereby the first deed of trust was set aside, the release deed and the second deed of trust were declared valid and binding, and Sallie H. Inge and her husband were directed to convey the Cox place to C. E. Smith, trustee, to be held by him subject to the terms of the deed of trust under which he held the residue of the complainant's property. There were other and subordinate provisions of the decrees appealed from which need not be here recited.

This brings us to a consideration of the assignments of error, the first of which calls in question the action of the circuit court in regard to the Cox place.

The evidence fully satisfies us that the three parties concerned in the partition, Mrs. Birdsong and her two children, deliberately and understandingly intended to divide the real estate in such a way as that Mrs. Birdsong would receive a conveyance in fee simple for the Cox place, and that it was conveyed to her daughter by mistake. This being true it is unnecessary to speculate in regard to the reasons which may have led the two children to agree upon a partition which apparently gave their mother a higher and more valuable estate than her dower interest would have entitled her to receive. The natural presumption that in such a partition the widow would get no land in fee simple must of course yield to affirmative proof to the contrary. In this case there is such proof, and it is clear and convincing.

But it is urged that, if there was a mistake in regard to the Cox place, which would ordinarily be relievable in equity, the complainant has lost her right to such relief, by laches, acquiescence, ratification and conduct on her part working an equitable estoppel. These several alleged bars to her suit are urged with much earnestness by counsel for the appellants, but we are of opinion that the evidence is not sufficient to sustain either of them.

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The complainant learned of the mistake shortly after the partition deeds were made. A few months later she married Mr. Inge. Very soon thereafter, her daughter, Mrs. S. H. Inge, offered to reconvey the Cox place to her mother, and the latter declined to have her do so, telling her to let it stay "just like it is." As to these facts there is no dispute; but the elder Mrs. Inge states emphatically and repeatedly that she did not accept the reconveyance because she did not wish her husband to have the property and so informed her daughter, Mrs. S. H. Inge. The clear result of her testimony is that she regarded the property as her own, expected to continue to receive the rents and profits, and that while she probably intended to allow it to remain in her daughter's name and finally to become hers, she made no agreement to that effect and did not intend to surrender her control over it, or her right to demand a deed, if she so desired, during her lifetime. The testimony of the daughter and of the son, J. L. Birdsong, is apparently in some particulars in conflict with her testimony as to her purpose and intention in declining the reconveyance; but the conflict is more apparent than real, when it is remembered that she practically admits the statements which they ascribe to her, and that she differs from them chiefly as to what she meant. The explanation which she gives is not inconsistent with the language she used, and Mrs. S. H. Inge, who admits the mistake, has the burden of proving the acquiescence, ratification and estoppel upon which she relies. In carrying this burden, she must do more than merely to prove ambiguous and equivocal conduct and statements on the part of her mother. (*Baugh & Sons' Co.* v. *Black, ante* p. 12, 93 S. E. 607; 10 R. C. L., sec. 150, p. 845.) And it is to be observed that Mrs. S. H. Inge nowhere in her testimony denies that her mother said exactly what she claims to have said in explanation of her refusal to accept a reconveyance. One statement in the testimony of J. L. Birdsong is susceptible of an interpretation which

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would mean that he heard his mother say she did not want a deed for the Cox place because she wanted her daughter to have it. It is not clear whether this statement was intended to express the opinion of the witness or to quote the language of his mother. In either event, he was speaking of only one conversation and the elder Mrs. Inge is not contradicted by any witness in her statement that she told her daughter many times that she did not want the reconveyance because she did not want her husband to get the property. This may not have been a very logical reason to assign, but it is consistent with her claim to the ownership of the property.

It appears that Mrs. S. H. Inge and her husband have given a deed of trust on the Cox place since Mrs. Helen Inge declined the offer of reconveyance, and it is insisted that this has placed the daughter in a worse position than she would otherwise have occupied and that, therefore, the mother is now estopped from asserting her right to the land. This contention is without merit. If it be conceded that her mother said enough to lead Mrs. S. H. Inge to think she had a right to encumber the land, the evidence is clear that she was not in fact influenced or injured thereby in the least, for she states that she did not even know the deed she had signed was a deed of trust on the Cox place. In a letter to her mother, written after the suit was brought and after her attention had been called to the fact that she had united with her husband in a deed of trust on the Cox place, she expressly states that the money secured thereon was borrowed for a third party, that she and her husband are secured collaterally for the amount, and, besides, that they are able to pay off "this deed of trust and several more like it at any time." It is perfectly apparent that the deed of trust has in no way inconvenienced or embarrassed her.

Upon the question of laches, it is only necessary to say, in addition to what has already been said, that scarcely a

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year elapsed after Mrs. Helen Inge learned of the mistake until she became ill and mentally incompetent to protect her interests, and remained so practically all the time until shortly before this suit was brought. This is clear from the testimony of the appellees themselves.

"From the nature of the case, no rigid rule can be laid down as to what delay will constitute laches; every suit must depend upon its own circumstances. But whenever the delay fairly justifies the inference of acquiescence in the adverse claim, or whenever it has been of such a character as to induce other persons to alter their circumstances or conduct, so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar." Merwin's Equity & Equity Pl., sec. 908.

It is clear from this general statement of the law on the subject, viewed in the light of the foregoing review of the evidence, that the complainant's case is not, in any aspect, affected by the doctrine of laches.

Passing now to the alleged error of the circuit court in finding that the complainant was insane on March 11, 1913, we are of opinion that the evidence abundantly supports this conclusion. The appellants say, in their petition for appeal, "the evidence is overwhelming that, with the exception of occasional intervals, the complainant was generally insane from 1910 to September, 1914;" and, this being true, it follows that the burden of proving a lucid interval on March 11, 1913, rested upon the appellants.

In the case of *Fishburne* v. *Ferguson*, 84 Va. 87, 107, 4 S. E. 575, 580, Judge Lewis, delivering the opinion of this court, said, "although derangement when alleged must be proved, yet if a state of general derangement be once established, and a lucid interval is claimed to have afterwards prevailed at a particular period, then the burden of proof is upon the party alleging such lucid interval to show

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sanity and competence at the period the act was done, and to which the lucid interval refers."

The burden thus cast upon the appellants was not sustained. The husband, S. T. Inge, does testify that she was as nearly normal on March 11, 1913, as he ever saw her; but he also says that the disease, pellagra, which attacked her in 1910, "crazed her," made her "the wildest woman he ever saw," and that she did not recover her mental faculties while they continued to live together. The other evidence relied upon as tending to show her sanity when the deed was made is negligible, and the circuit court rightly found that she was not competent to make the deed to her husband.

Having reached this conclusion, it is unnecessary to consider the next assignment of error, which assails the action of the court in finding that the deed of release and reconveyance from S. T. Inge to his wife was duly delivered and, therefore, valid and binding. The original deed being void, the release is immaterial.

The only other question requiring our consideration is whether the court erred in holding that on November 18, 1914, when Mrs. Inge executed the deed of trust to C. E. Smith, she was mentally competent to do so. This court is of opinion that the finding of the circuit court on this question was right, and the necessary result is that all the remaining questions raised by the appellants are without merit and require no further discussion.

The testimony of members of complainant's family tends to show that she was improving in 1914, prior to the date on which she left her husband and went to the home of her brother. The physicians who examined her after she came to Waverly considered her competent to transact business and so testified. Her own testimony, given in this suit some time after she had made the deed to Smith, while indicating some eccentricity, tends strongly to show that she fully understood the transaction.

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Aside, perhaps, from the question as to Cox place, the real controversy here is as to the person who shall act as trustee. All parties concede that it is best for Mrs. Inge to have her estate in the hands of a trustee; her husband insists that he is glad to be relieved of the trust; and she herself has selected a man who is shown to be competent and trustworthy. The appellants object to her selection and prefer some member of her family, one or more of whom would be willing to act, and, unlike Mr. Smith, to do so without compensation. This is a natural preference on their part, and it seems unfortunate that Mrs. Inge does not take the same view of the matter, but in declining to conform to their wish in this respect she is certainly within her legal rights.

There is no error in the decrees complained of, and they are affirmed.

Affirmed.

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Syllabus.

Richmond

JOHNSON, RECEIVER, v. BUTTON, COMMISSIONER, AND OTHERS.

January 11, 1917.

Absent, Sims, J.
Absent, Prentis, J.*

1. INSURANCE—*Insolvency of Foreign Insurance Company.*—Where an insurance company, after writing numerous policies, becomes insolvent, it can not demand a return of a proportionate part of the commissions of its agents, on policies cancelled at the time of the receivership, there being no custom requiring the return of commissions as in case of surrender, and the company not being entitled to profit by its own default.
2. INSURANCE—*Insolvency.*—The insolvency of an insurance company *ipso facto* cancels its outstanding policies and entitles holders to "return premiums" upon the "pro rata" instead of upon the "short rate" basis.
3. INSURANCE—*Insolvency—General Agent.*—Upon the insolvency of an insurance company, premiums collected by the receiver from sub-agents may be turned over to the general agent, instead of being held to await a settlement between all parties, where the general agent had the appointment of the sub-agents and was personally liable to the company for any balances that might be due from the sub-agents within his territory, and was under bond for the faithful performance of his contract.
4. INSOLVENCY — *Jurisdiction — Settlement with General Agent.*—Upon the insolvency of a foreign insurance company, the proper place for a settlement between the company and its general agent for two States is in the suit in its home State for general liquidation of the company's business, and not in an ancillary proceeding in one of the other States.
5. INSURANCE—*Rights of General Agent.*—The general agent of an insurance company, to whom policy holders have assigned their policies, stands on the same plane with all other holders of Virginia policies canceled by the insolvency of the company, and is entitled to share with them the benefits of his statutory lien on the securities held by the treasurer.

* Submitted before Judge Prentis took his seat.

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Appeal from a decree of the Circuit Court of the city of Richmond in an ancillary proceeding by the Commissioner of Insurance against a foreign insolvent company. From the decree, the receiver of the company appeals.

Amended and Affirmed.

The opinion states the case.

Kelley & Coulbourn, for the appellant.

John B. Minor and *J. Winston Read,* for the appellees.

WHITTLE, J., delivered the opinion of the court.

The American Union Fire Insurance Company, a Pennsylvania corporation, having complied with the statutory requirements, including the deposit of $25,000 of securities with the treasurer of the Commonwealth, was licensed to engage in the business of fire insurance in this State. To that end, on May 1, 1911, it appointed Sol Miller general agent for Virginia, which agency was subsequently extended so as to embrace the territory of West Virginia and include the business of the Monongahela Underwriters Agency.

In March, 1913, the State of Pennsylvania, in a proceeding at the relation of its insurance commissioner, procured a decree from the Court of Common Pleas of Dauphin county, in that State, determining the insolvency of the insurance company, and ordering its dissolution and liquidation of its business by the State Insurance Commissioner. By its terms the decree became effective March 27, 1913. On March 12, 1913, the Commonwealth of Virginia, at the relation of Joseph Button, Commissioner of Insurance, filed

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an ancillary petition in the Circuit Court of the city of Richmond against the company, alleging its insolvency and reciting the receivership proceedings against it in the Pennsylvania court. The petition also charged that there were unadjusted and unsettled demands against the company for fire losses sustained by policy holders in this State, and prayed that it be required to show cause why the Commissioner of Insurance should not take possession of its assets therein and distribute the proceeds among those ascertained to be entitled thereto. A creditors' bill was likewise filed in the circuit court against the company, which prayed for similar relief; and the two proceedings were heard together.

The compensation of Miller was fixed by written contract at thirty-five per cent. commissions upon all policies written by him and his sub-agents in this State. Miller filed his petition in the proceedings, in which, adverting to the Pennsylvania receivership, he alleged that he "was advised that the appointment of said receiver *ipso facto* cancelled all the policies of said companies then outstanding; but in addition that he had been instructed by the proper officers of said receivership to discontinue writing business for said companies, and advised that all policies should be cancelled. Thereupon petitioner and his sub-agents took the necessary steps to cancel said policies, and return the proper proportion of the premiums to policy holders."

The company made no answer to this petition by demurrer or other pleading; and the court directed a reference to one of its commissioners in chancery to inquire into the various matters involved in the subsidiary litigation.

With respect to the main contention of the general receiver, that the Virginia agents should be required to pay back unearned commissions on policies cancelled at the time of the receivership, the commissioner made the following finding: That after the receivership, these agents in order to protect their policy holders, issued new policies in other

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companies for the unexpired terms of the old policies, which latter, in consideration of the new policies, were surrendered to the agents. The agents filed the old policies of which they held assignments and claimed the return premiums for the unexpired terms. And the commissioner was of opinion that they occupied the same position that the policy holders would have occupied if they had filed their policies direct; that the agents had performed their full duty to the companies in issuing policies, collecting premiums and delivering the policies to the insured, and that the failure of the companies was through no fault of theirs; and that their only reason for appearing in this litigation was to file their claims for unearned premiums on the policies held by them as assignees.

The commissioner's findings upon the principal questions referred to him were adverse to the company, and the general receiver appealed from a decree confirming his report.

The contention of appellant with respect to the agents' compensation is, that inasmuch as their commissions were based upon "net premiums," all claims for "return premiums" should be charged with their proportionate part of the commissions; and, furthermore, that as the policies had not been cancelled by the company, return premiums should be computed upon what is known as the "short rate" basis. The opposing theory of the agents conformed to the findings of the commissioner as approved by the circuit court.

The affidavits of representative agents of a number of fire insurance companies show that it is the custom and usage with such companies to construe the term "net premiums" in contracts similar to the one in question to mean that the general or local agent of the company should return the proper proportion of all premiums which had either been cancelled by the insured, or by the company while a going concern, without any neglect or default on the part of such company; but that where the company had

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been placed in the hands of a receiver, and its policies cancelled without fault on the part of the agent, no obligation rested on such agent to return any part of the commissions received by him on premiums on policies so cancelled.

In 22 Cyc. 1440, the general rule is thus stated: "The rights of an agent to compensation as to cancelled policies must be determined according to the contract, express or implied, under which he is employed, and it may be competent to show the course of dealing between him and the com pany in order to fix his compensation. He is generally entitled to commissions on the whole premium paid, and cannot be limited to the portion earned up to the time of cancellation." Citing *Insurance Com.* v. *Peoples Fire Ins. Co.*, 68 N. H. 51, Atl. 82; *Garfield* v. *Rutland Ins. Co.*, 69 Vt. 549, 38 Atl. 235; *Am. Steam Boiler Ins. Co. v. Anderson*, 6 N. Y. Supp. 507.

And in 22 Cyc. p. 1404, it is said: "The insolvency of an insurance company constitutes a breach of contract on its part, and on dissolution of the company claims of policy holders are debts due *in praesenti.* * * * A company cannot recover premiums for the portion of the term of insurance after insolvency has taken place. Nor can it maintain an action against an agent for the recovery of premiums received by him, the consideration for which has thus failed. The insolvency of the company being a breach of its contract as to an existing policy holder, the latter is entitled to recover the portion of the premium paid which is unearned at the time of the insolvency, and this is so, even though there is no provision for refunding premiums paid."

These authorities hold that insolvency of the company *ipso facto* cancels its outstanding policies and entitles policy holders to "return premiums" upon the *"pro rata"* instead of upon the "short rate" basis, as contended by appellant.

The case of *Hay* v. *Union Fire Ins. Co. and the Monon-*

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gahela Underwriters Agency, &c., 167 N. C. 82, 83 S. E. 242, involved the same question with the same companies touching the effect of their insolvency upon the North Carolina business, and, therefore, is directly in point. The facts in the two cases are identical, and, upon a review of the authorities, the court holds: "When a fire company, after writing numerous policies, becomes insolvent, it could not demand a return of a proportionate part of the commissions paid the agents, there being no custom requiring such return of commissions as in case of surrender, and the company not being entitled to profit by its own default; hence no such deduction could be made from claims of policy holders for unearned premiums assigned to the agents."

The agent's claim to commissions rests upon the conclusive ground that he has fully complied with the terms of his employment, and the transaction fails of accomplishment from no fault of his, but from the insolvency of the company. See the well-reasoned case of *Currier* v. *Mut. Reserve Fund Life Association*, 108 Fed. 737, 47 C. C. A. (5th Cir.) 651, citing 4 Am. & Eng. Enc. Law (2nd ed.) 972; Story on Agency, sec. 329; Mechem on Agency, secs. 611, 612; 16 Am. & Eng. Enc. Law (2nd ed.) 911; *Knock* v. *Emmerling*, 22 How. 69, 16 L. Ed. 292.

An examination of the authorities relied on by appellant shows that some of them are to be distinguished from this case upon the facts, and that others have been overruled by subsequent decisions.

Upon the main question, it seems to us that the better reason and weight of authority are on the side of appellees.

The second assignment of error involves the action of the circuit court in decreeing that $911.31, collected by Receiver Johnson from sub-agents be turned over to the general agent, Miller, instead of being held to await a settlement between all parties; and also declining to direct settlements in this proceeding, without consent of parties, be-

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tween Miller and his sub-agents, and between him and the companies.

We find no error in this ruling. Miller had the appointment of the sub-agents, and was personally liable to the companies for any balances that might be due from sub-agents within his territory, and was under bond in the penalty of $5,000 for the faithful performance of his contract. There is no suggestion of insolvency or inadequacy of the security given by Miller to meet any possible balance that might be ascertained to be due from him to his principal. The fund in question forms no part of the assets of the company, but is the property of Miller and was rightly decreed to him.

Nor was it error in the court, in exercising a limited statutory jurisdiction, to decline to decree a settlement between Miller and the companies. Such settlement necessarily would cover the transactions of the general agent both in Virginia and West Virginia, and the proper place for that settlement is the suit in Pennsylvania for general liquidation of the companies' business.

The third assignment of error challenges the ruling of the circuit court establishing Miller's lien upon the bonds deposited with the State treasurer for return premiums as assignee of certain policies; the contention being that Miller should only be allowed a lien for such balance as might be found due upon a settlement with the company as general agent on Virginia business.

What has already been said in the discussion of the second assignment of error to some extent applies to this assignment. With respect to policies held by Miller as assignee, he stands on the same plane with all the other holders of Virginia policies cancelled by the insolvency of the company, and is entitled to share with them the benefits of his statutory lien on the securities held by the treasurer. *Non constat* that upon a *general accounting* there will be any amount owing from Miller to the company. He has

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given a solvent bond for the faithful performance of his contract, while the company admittedly is insolvent. In these circumstances, his lien should not be postponed, and perhaps jeopardized, to meet a possible liability.

It follows from the discussion of the last two assignments that the cross-error of appellees is well assigned, and that payment of the sum of $721.84, referred to therein, belonging to Miller, ought not to be withheld to await the result of the settlement between him and the company.

For these reasons, the decree must be amended in the particular indicated, and in all other respects will be affirmed.

Amended and Affirmed.

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Richmond.

KLAFF V. VIRGINIA RAILWAY AND POWER COMPANY.

January 11, 1917.

Absent, Prentis, J.*

1. MALICIOUS PROSECUTION—*Probable Cause—Pleading.*—A declaration in an action for malicious prosecution charged that the defendant maliciously and without any reasonable or probable cause instigated and procured the plaintiff to be indicted and tried for grand larceny; and that upon the trial plaintiff was acquitted and the prosecution finally ended.

   Held: That this declaration was sufficient; and that it is not necessary where the declaration discloses an indictment by a grand jury, in addition to alleging a want of probable cause, to set out the evidence upon which that averment is predicated.
2. PLEADING—*Conclusions of Law.*—The allegation in a declaration in an action for malicious prosecution that the prosecution was without probable cause, is not merely the assertion of a conclusion of law. It is the allegation of an ultimate fact.
3. ULTIMATE FACTS.—"Ultimate facts" are defined as: Facts in issue as opposed to probative or evidential facts, the latter being such as serve to establish or disprove the issue.
4. MALICIOUS PROSECUTION — *Probable Cause — Pleading.*—Where, however, plaintiff was convicted of the crime for which he was prosecuted, a different principle applies. In case of conviction the presumption of the existence of probable cause is not merely *prima facie*, but conclusive, unless the conviction is alleged and proved to have been procured by the defendant through fraud or by means of evidence which he knew to be false.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

* Submitted before Judge Prentis took his seat.

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Rumble & Campe, for the plaintiff in error.

R. E. Miller, W. H. Venable and *H. W. Anderson*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the plaintiff in error against the defendant in error to recover damages for a malicious prosecution. The declaration, upon the point involved, charges that the defendant maliciously and without any reasonable or probable cause instigated and procured the plaintiff to be indicted by the grand jury of the Corporation Court of the city of Norfolk for grand larceny, etc., and caused the plaintiff to be tried for that offense; and that upon the trial the plaintiff was acquitted and the prosecution finally ended.

The trial court sustained a demurrer to the declaration; and, the plaintiff having declined to amend, the judgment under review was entered, dismissing the action.

It is admitted that the finding of an indictment by a grand jury is *prima facie* evidence of probable cause; and the single question to be determined is whether, under the practice in this State, it is necessary, where the declaration discloses an indictment by a grand jury, in addition to alleging a want of probable cause, to set out the evidence upon which that averment is predicated.

The essentials of the action for malicious prosecution are thus stated in Burks' Pl. & Pr., p. 233: "The form of action is trespass on the case generally. In order to sustain the action it must be alleged and proved: (1) That the prosecution was set on foot by the now defendant, and that it has terminated in a manner not unfavorable to the now plaintiff; (2) that it was instituted, or procured by the co-operation of the now defendant; (3) that it was without probable cause; and (4) that it was malicious."

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There is no suggestion in the text that in such case matters of evidence which merely go to establish the constituent elements of the action are required to be set out in the declaration. To the contrary the learned author (p. 946) lays down as a subordinate rule of pleading, that "it is not necessary in pleading to state that which is merely matter of evidence." At pp. 947-948 he observes: "This is a rule, so elementary in its kind and so well observed in practice, as not to have become frequently the subject of illustration by decided cases; and (for that reason probably) is little if at all noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail in which the allegations, under other systems of judicature, are involved."

But we need not invoke "modern instances" to support the declaration in this case. It follows literally, in the matter drawn in question by the demurrer, the form given in 2 Chitty on Pleading (6th Am. Ed.), p. 612-d—a work that has been the *vade mecum* of the Virginia lawyer for more than three-quarters of a century, and is the accredited source of many valuable forms found in the appendix to 4 Minor's Institutes, Pt. II, p. 1307.

The contention of defendant in error rests upon the fundamental error that the allegation in the declaration that the prosecution was without probable cause, is only the assertion of a conclusion of law. It fails to distinguish between the allegation of a fact which constitutes the cause of action, and the evidence which upon the trial is required to prove the existence of such fact. The former is an *ultimate fact* which must be pleaded, while the latter is mere matter of evidence which has no place in the pleadings. *"Ultimate Facts"* are defined as, "Facts in issue as opposed to probative or evidential facts, the latter being such as serve to

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establish or disprove the issue." 2 Bouvier's Law Dict. (Rawle's Rev.) 1152.

Of course, a different principle applies where there has been a conviction, in which case the presumption of the existence of probable cause is not merely *prima facie* but *conclusive,* unless it is alleged and proved to have been procured by the defendant through fraud or by means of evidence which he knew to be false. The cases of *Saunders* v. *Baldwin,* 112 Va. 431, 71 S. E. 620, 34 L. R. A., N. S. 958, Ann. Cas. 1913 B, 1049, and *Craft* v. *Moloney Belting Co.,* 117 Va. 480, 85 S. E. 486, represent types of the latter class.

Where the declaration simply alleges that the plaintiff was convicted of the crime for which he was prosecuted, obviously it states no cause of action. Therefore, in such case, it is essential to repel the otherwise conclusive presumption of probable cause arising from the judgment of conviction, both by averring and proving that the conviction was procured by the defendant by fraud or by means of evidence which he knew to be false.

Rightly interpreted, the case of *Saunders* v. *Baldwin, supra,* is authority for the sufficiency of the declaration in the instant case. The first count in that case alleged a want of probable cause, but it furthermore showed a judgment of conviction by the justice, which afterwards on writ of error was reversed and the accused discharged. And the controlling question there was whether the original conviction established *conclusive* or only *prima facie* evidence of probable cause. Judge Buchanan, in a convincing opinion, shows that the conviction by the justice was *conclusive evidence* of probable cause, and for *that reason* held that the first count, which failed to aver that the conviction was procured by the defendant through fraud or by means of evidence which he knew to be false, was bad on demurrer.

We have not deemed it necessary to review outside authority on what we conceive to be a well-settled rule of Virginia practice. Nevertheless, an examination of the

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cases to which our attention has been drawn shows that the weight of authority and "the rule of reason" sustain the declaration in this case.

For these reasons, the judgment under review must be reversed, and this court will enter such judgment as the trial court ought to have entered, and will overrule the demurrer to the declaration and remand the case for further proceedings.

Reversed.

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Richmond.

MAGRUDER AND OTHERS v. VIRGINIA-CAROLINA CHEMICAL COMPANY AND OTHERS.

January 11, 1917.

Absent, Sims, J.

1. NUISANCE—*Limitation of Actions.*—Where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action; and the right of recovery will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.
2. NUISANCES—*Pollution of Stream—Laches.*—Plaintiffs filed their bill for an injunction and damages against the defendants for the pollution of a watercourse by the operation of defendants' mines. There was a serious conflict in the testimony of the non-expert witnesses as to the real cause of the conditions complained of. Moreover, the property affected was located ten or twelve miles down stream from the mines, and analyses by two experienced chemists of water taken from the stream at that point showed that it was normal, and not injurious to the soil, or trees and other vegetation, or to fish. A third analysis of the water was made by another chemist employed by a person having a common interest with plaintiffs, yet he was not examined as a witness, nor was his analysis put in evidence. It also appeared that plaintiffs suffered more than twenty years to elapse after the opening and operation of the mines before they sought redress from the courts for the supposed violation of their rights.

   Held: That this did not present a case for perpetual injunction and decree for damages.

Appeal from a decree of the Circuit Court of Louisa county. Decree for defendants. Complainants appeal.

Affirmed.

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The opinion states the case.

E. H. DeJarnette, Jr., for the appellants.

Coke & Pickrell, Gordon & Gordon, James R. Caton and *W. Worth Smith*, Jr., for the appellees.

WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree of the Circuit Court of Louisa county denying a permanent injunction and dismissing appellants' bill, the material allegations of which are as follows:

That plaintiffs are the owners of 808 acres of land lying on North Anna river, in Spotsylvania county, below the point where Contrary creek flows into that stream; that 250 acres of the main tract are low grounds adjoining the river and subject to overflow in time of freshets; that defendants and their predecessors in title have been owners and operators of certain iron and pyrites mines (located at different points on Contrary creek several miles above its junction with North Anna river) continuously since the year 1885; that in the operation of these mines by the respective owners, the water pumped from the shafts, as well as the water used in washing the ores in the ore-washing or concentration plants is impregnated by the ore with sulphuric acid and other injurious substances, and flows into Contrary creek and thence into and down North Anna river to plaintiffs' farm; that the waters of the river are so poisoned by the washings from the mines as to be rendered completely worthless for all domestic and agricultural purposes, and are fatal to fish; that the trees and other vegetation upon plaintiffs' low grounds are thereby killed, and the productivity and value of the land itself is seriously im-

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paired if not destroyed; that the alleged injuries of which they complain constitute a permanent nuisance; and the bill prays that defendants be perpetually enjoined from polluting the waters of the streams by the washing of ore and pumping polluted and poisonous waters from their mines and pits into the same; and that damages may be awarded plaintiffs for injuries already inflicted upon them.

Defendants filed demurrers and answered the bill, and also interposed the defense of the statute of limitations.

The trial court was of opinion that the cause of action was barred by the five years' limitation, and decreed accordingly. From the correctness of that conclusion there can be no escape under the following decisions of this court: *Va. Hot Springs Co.* v. *McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A., N. S., 465, 10 Ann. Cas. 179; *Southern Ry.* v. *McMenamin*, 113 Va. 121, 73 S. E. 980; *McKinney* v. *Trustees Emory & Henry College*, 117 Va. 763, 86 S. E. 115, and *Worley* v. *Mathieson Alkali Works*, 119 Va. 862, 89 S. E. 880. These cases declare the firmly established rule of law in this jurisdiction to be, that where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action; and that the right of recovery will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.

The undisputed facts of this case bring it completely within the influence of the principle stated, and, in essentials, the case is undistinguishable from that of *Worley* v. *Mathieson Alkali Works, supra.* The causes of action in both cases are the same, namely, the alleged injury to property rights of plaintiffs and the destruction of fish, etc., from the pollution of the waters of non-navigable streams caused by discharging noxious refuse matter therein from

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the defendants' works. In both cases the grounds of complaint are permanent, "the consequences of which, in the normal course of things, will continue indefinitely; * * * that the plant when first constructed was intended to be permanent, and has been so treated and used ever since; and that as long as it is operated so long will the nuisance complained of be constant, continuous and injurious to the plaintiff."

Upon these considerations, the ruling of the trial court in sustaining the plea of the statute of limitations and dismissing the bill was plainly right.

But independently of the question of the bar of the statute, it is by no means clear that plaintiffs, upon the merits, have shown themselves entitled to injunctive relief and to a decree for damages. We shall not undertake to review the evidence covering many pages of the record. It is sufficient to say that there is serious conflict in the testimony of the non-expert witnesses as to the real cause of the conditions complained of. Moreover, the farm is located ten or twelve miles down stream from the mines, and analyses by two experienced chemists of water taken from the stream at that point showed that it was normal, and not injurious to the soil, or trees and other vegetation, or to fish. A third analysis of the water was made by another chemist employed by a person having a common interest with appellants, yet he was not examined as a witness, nor was his analysis put in evidence. It also appeared that appellants suffered more than twenty years to elapse after the opening and operation of the mines before they sought redress from the courts for the supposed violation of their rights. In these circumstances, a chancellor well might hesitate to grant a perpetual injunction and decree damages against these extensive mining industries, which are shown to be of great public utility.

The decree of the circuit court is affirmed.

Affirmed.

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Syllabus.

Richmond.

CITY OF NORFOLK v. NORFOLK COUNTY.

January 11, 1917.

Absent, Prentis, J.*

1. DECLARATION—*Account—Demurrer.*—An account filed with a declaration is no part of the declaration, and defects in the account cannot be taken advantage of by demurrer.
2. ASSUMPSIT—*Demurrer.*—A demurrer will not lie to a common law count in assumpsit.
3. ASSUMPSIT—*Money Had and Received—In What Cases the Action Lies.*—There are three classes of cases in which the action of assumpsit properly lies for the recovery of money, viz.: 1. Where there is an express contract in fact and privity in fact between the parties plaintiff and defendant. 2. Where there is an implied contract in fact and privity in fact between the parties plaintiff and defendant. 3. Where there is an implied contract in law and no privity in fact, but an implied privity in law, between the plaintiff and defendant. The case at bar falls within the class last named, which is characterized as *quasi ex contractu*, the obligation upon which it rests being so designated under the civil law, from which the principle of such obligation was derived.
4. ASSUMPSIT—*Consideration.*—A valid and sufficient consideration, either of benefit moving from, or of detriment to (in change of status of), the plaintiff, is absolutely essential to support the action of assumpsit in all three classes of cases enumerated above.
5. ASSUMPSIT—*When the Action Lies.*—Assumpsit lies in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff; in which cases there is, of necessity, the existence of a valid and sufficient consideration of detriment to the plaintiff, otherwise the equity of the latter would not arise—and in which cases, also, there is an absence of facts expressly proved which *ex aequo et bono* negative the existence of any promise. And this is so irrespective of whether the money was received from the plaintiff or a third person.

* Submitted before Judge Prentis took his seat.

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6. ASSUMPSIT—*Privity.*—Privity in fact is not essential in an action of assumpsit.
7. ASSUMPSIT—*Implied Promise.*—The fiction of an implied promise will not be indulged in every case, but only where, in equity and good conscience, the duty to make such a promise exists. When the defendant has derived no right from the plaintiff, has not by mistake or fraud usurped or gotten the benefit of any original right of the plaintiff to the detriment or injury of the right of the latter, but relies upon a *bona fide* hostile claim or right, no such duty exists of the defendant to the plaintiff and the law will not indulge the fiction of the existence of an implied promise of defendant to plaintiff, for that would, in such case, be in itself inequitable.
8. ASSUMPSIT—*When the Action Lies.*—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. That is to say, the plaintiff may recover whenever, but for the mistake or fraud, he would have had unquestioned right to the money. Such cases rest upon the plaintiff's original right to the fund, which right has been lost to the plaintiff or impaired by the mistake or fraud. Where the defendant received the money by a right which is independent in its origin from the original right of the plaintiff and in no way goes upon or displaces the latter, the recovery is properly denied. In such case the express facts negative any possibility of a promise of defendant to pay plaintiff anything, and equally negative any privity between their claims of right to the fund. Furthermore, no consideration exists to support the action.
9. ASSUMPSIT—*Action by City Against County to Recover Taxes Paid Through Mistake to County.*—By an act of assembly certain territory, formerly in the county of Norfolk, was annexed to the city of Norfolk. In this territory was located certain property of a railroad and terminal company. After the annexation this property was by mistake erroneously supposed to be situate and taxable in the county of Norfolk, whereas in fact it was situate and taxable in the city of Norfolk. By reason of this mistake the property was erroneously assessed for taxes for certain years after such annexation in the county of Norfolk, instead of in the city of Norfolk, as it should have been; and the taxes were paid by said companies to the county of Norfolk.

   Held: That since under the statute such error in assessment could not be corrected after thirty days from such assessment, the city might sue the county in assumpsit to recover the taxes paid the county under the mistaken assessment; payment by

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the companies to the county being a valid payment under the statute law of the State and the receipt of the county of Norfolk being a complete acquittance of the railroad companies of all further liability.

Error to a judgment of the Circuit Court of Norfolk county in an action of assumpsit. Judgment for defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

Robert W. Tomlin, William G. Maupin and *J. D. Hank, Jr.*, for the plaintiff in error.

A. B. Carney and *E. R. F. Wells*, for the defendant in error.

SIMS, J., delivered the opinion of the court.

The court below sustained the demurrer of the defendant, the county of Norfolk, to the declaration of the plaintiff, the city of Norfolk.

The declaration contains two counts. The first is the common law count of *indebitatus assumpsit* for money had and received. The second is a special count.

There was an account filed with the declaration.

The facts alleged in the declaration, or admitted in argument, are substantially as follows:

That, by a certain act of Assembly of Virginia mentioned, certain territory, formerly in the county of Norfolk, was annexed to such city; that in this territory was located certain property of the Norfolk and Western Railway Company and of the Norfolk and Atlantic Terminal Company; that after such annexation such property of said companies was, by mistake, erroneously supposed to be situate and taxable in the county of Norfolk, whereas it was in fact then situate

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and taxable in the city of Norfolk; that by reason of such mistake such property was erroneously assessed for taxes for certain years after such annexation in the county of Norfolk, instead of in the city of Norfolk, as it should have been; and that the taxes for the years so erroneously assessed were by reason of such mistake paid by said companies to the county of Norfolk. The action was instituted by the city of Norfolk against the county of Norfolk to recover the amount of the taxes thus erroneously paid.

The demurrer was to the declaration as a whole and to each count thereof.

Only two of the grounds of demurrer are relied on before, and need to be considered by, us—the second and third—as the first ground was removed by the amendment of the declaration allowed and made in the court below. These two grounds are as follows:

"Second. The declaration and the account filed therewith show that there is no privity between the plaintiff and the defendant and therefore set forth no cause of action against this defendant.

"Third. The second count of the declaration shows that there is no privity between the plaintiff and the defendant, and therefore sets forth no cause of action against the defendant."

The order complained of sustained the demurrer to the whole declaration.

The assignments of error are as follows:

"1st. The court should not have sustained the demurrer to the declaration as a whole nor to the first count thereof, because the first count of the declaration is the common count of *indebitatus assumpsit* for money had and received, and as such is not demurrable.

"2nd. The court should not have sustained the demurrer on the ground that there is no privity between plaintiff and defendant."

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It is admitted in brief of counsel for appellee that it was through inadvertence that the order complained of sustained the demurrer to the first count, which was, as above stated, a common law count of *indebitatus assumpsit.*

The rule established in Virginia, that the account is no part of the declaration; that defects in the account cannot be taken advantage of by demurrer (*Campbell* v. *Angus,* 91 Va. 438, 22 S. E. 167; *Booker* v. *Donohue,* 95 Va. 359, 28 S. E. 584; *King* v. *N. & W. Ry. Co.,* 99 Va. 625, 39 S. E. 701; *Grubb* v. *Burford,* 98 Va. 554, 37 S. E. 4); and the further rule in Virginia that a demurrer will not lie to a common law count in assumpsit (*Portsmouth Refining Co.* v. *Oliver Refining Co.,* 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924) are not controverted by the brief of counsel for appellee.

It is clear, therefore, that the order complained of was erroneous in sustaining the demurrer to the whole declaration and to the *first* count thereof.

But, as stated above, this was through inadvertence and does not go to the real controversy in the case, which involves the decision of the court below upon the third ground of demurrer. As the latter will again have to be passed upon in some form if the judgment were reversed upon the sole ground that it was erroneous on the second ground of demurrer, we feel that we should pass upon the real controversy involved in the demurrer, which is contained in the said third ground of demurrer, namely: The question—

1. Whether *privity* between the plaintiff and defendant is essential to a cause of action of the plaintiff in such a case as that before us?

Speaking generally, there are three classes of cases in which the action of assumpsit properly lies for the recovery of money, namely:

1. Where there is an express contract *in fact* and privity *in fact* between the parties plaintiff and defendant.

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2. Where there is an implied contract *in fact* and privity *in fact* between the parties plaintiff and defendant.

3. Where there is an implied contract *in law* and no *privity in fact,* but an implied *privity in law,* between the plaintiff and defendant.

The case before us falls within the class last named, which is characterized as *quasi ex contractu,* the obligation upon which it rests being so designated under the civil law, from which the principle of such obligation was derived.

The history of the origin and growth of the action of assumpsit and the distinctions between the classes of cases mentioned are admirably stated in 2 Ruling Case Law, in its treatment of the subject "Assumpsit," from which we will make the following quotations:

"History.—In early times the want of a common law remedy suited to cases of nonperformance of simple promises caused frequent recourse to equity for relief, but in the twenty-five years of the reign of Henry VII. it was settled by the judges that an action on the case would lie as well for nonfeasance as for malfeasance, and in that way assumpsit was introduced. In theory it was an action for the nonperformance of simple contracts and the formula and proceedings were constructed and carried on accordingly. Very early, however, there were successful efforts to apply it beyond its import, and from the reign of Elizabeth this action has been extended to almost every case where an obligation arises from natural reason and the just construction of law, that is, *quasi ex contractu;* and is now maintained in many cases which its principles do not comprehend and where fictions and intendment are resorted to, to fit the actual cause of action to the theory of the remedy." 2 R. C. L., sec. 3.

With respect to the first and second classes of cases above mentioned this work says:

"Express and Implied Contracts.—The action of assumpsit lies for the enforcement of a contract express or im-

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plied, but the contract must necessarily contain all the essentials of an enforceable contract; thus it must be based upon a valid and sufficient consideration, and there must be privity of contract established between the parties. As ordinarily understood, the only difference between an express contract and an implied contract is that in the former the parties arrive at their agreement by words, either oral or written, sealed or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. In both of these cases there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it. To constitute either the one or the other the parties must occupy towards each other the contract status and there must be that connection, mutuality of will and interaction of parties, generally expressed, though not very clearly, by the term 'privity.' Without this a contract by implication is quite impossible." *Idem*, sec. 6.

With respect to the third class of cases above mentioned this work says:

"Quasi-Contracts.—We have seen that assumpsit will lie for the breach of an express contract or one implied in fact; but after subtracting express contracts and those implied in fact, there is still left another large class of obligations, to enforce which the action of general assumpsit is a well-established remedy. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil war. This obligation was under the civil law designated *quasi contractus*. Stated as a civil law principle, it was an obligation similar in character to that of a contract, but which arose not from an agreement of parties, but from some relation between them or from a voluntary act of one of them, or. stated in other language, an obligation springing from voluntary and lawful acts of

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parties in the absence of any agreement. In quasi contracts the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. The class of obligations now under consideration, and which are treated in works on contracts as contracts implied in law, or quasi contracts, is recognized and enforced by common law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases the duty defines the contract," *Idem*, sec. 8.

It should not be overlooked that in the last class of cases, as well as in the two former, above referred to, a valid and sufficient *consideration*, either of benefit moving from, or of detriment to (in change of status of), the plaintiff, is absolutely essential to support the action of assumpsit.

It will be observed that it is common to the second and third class of cases above mentioned that "the contract in fact" is implied in law in the former; and "the contract in law" is implied in law in the latter. Therefore "contracts in fact" and "contracts in law" are both *implied in law* under certain circumstances, and are spoken of as "implied contracts" frequently in the cases, without discrimination, which sometimes leads to confusion of thought.

We come now to consider when the law will act and imply a contract and privity, in the third class of cases under

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consideration, where neither in fact exists, so as to support an action of assumpsit.

In this connection it will be found that the law will make such implications in the third class of cases in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff; in which cases there is, of necessity, the existence of a valid and sufficient consideration of detriment to the plaintiff, otherwise the equity of the latter would not arise—and in which cases, also, there is an absence of facts expressly proved which *ex aequo et bono* negative the existence of any promise in fact. And this is so irrespective of whether the money was received from the plaintiff or a third person. *Idem*, sec. 34, and numerous cases cited, among which is the case of *Lawson's Ex'or* v. *Lawson*, 16 Gratt. (57 Va.) 230, 80 Am. Dec. 702, cited in brief for appellant, hereinafter more particularly referred to.

An examination of the numerous authorities cited before us for appellant and appellee bear out the correctness of the above distinctions.

Among the authorities cited for appellant are the following:

In *Bayne* v. *United States*, 93 U. S. 642, 23 L. Ed. 997, it is said: "Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to pay."

As said by Mr. Justice Daniels in *Cary* v. *Curtis*, 3 How. 236, 11 L. Ed. 576: "The action of assumpsit for money had and received, it is said by Lord Mansfield (Burr. 1012, *Moses* v. *Macfarlen*), will lie in general whenever the defendant has received money which is the property of the

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plaintiff and which the defendant is obliged by the ties of natural justice and equity to refund."

In the same case, Mr. Justice Story, in his able and elaborate opinion on this subject says: "It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of assumpsit for money had and received is founded upon a voluntary, express or implied promise, of the defendant, or that it requires privity between the parties *ex contractu* to support it. The rule of the common law has a much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another which he has no lawful right to exact or retain from him, there it forces the promise upon him *in invitum* to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor. The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or by virtue of some contract, is disregarded, upon the maxim *qui haeret in litera haeret in cortice.* Hence it is a doctrine of the common law (as far as my researches extend) absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive or exact or retain it, an action for money had and received lies to recover it back."

In *B. & O. R. Co.* v. *Burke and Herbert,* 102 Va. 643, 47 S. E. 824, Keith, P., delivering the opinion of this court said: "As between a promisor and promisee there is privity, and if the facts be such as to raise an implied promise on the part of the defendant, if the defendant has in his possession

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money which in good conscience he ought to pay to the plaintiff, the law will imply a promise on the part of the defendant to do his duty and to pay the money; and this implied promise is as effectual to create privity between the parties as an express promise would be.

"These propositions, we think, are fundamental, and we shall cite but little authority in support of them."

In *Lawson's Ex'or* v. *Lawson*, 16 Gratt. (57 Va.) 230, 80 Am. Dec. 702, above referred to, Lee, J., says: "The action of *indebitatus assumpsit* for money had and received will lie whenever one has the money of another which he has no right to retain, but which *ex aequo et bono*, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract, *quasi ex contractu* as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay."

The case of *Booker* v. *Donohoe, supra*, is very much in point in consideration of the question of whether privity in fact is an essential in an action of assumpsit. That was an action of assumpsit by the duly elected clerk of Elizabeth county against one who had unlawfully assumed the duties of the office and collected and converted to his own use fees and emoluments thereof. There was no privity in fact between the *de facto* officer, the defendant, and the *de jure* officer, the plaintiff; third parties paid the money. In that case the court held: "It seems to be a principle of natural justice as well as law, that where one person has injured another, or received compensation which in equity

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and good conscience belongs to another, he may be required by action to account to such other for the injury done him. * * * The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the *de jure* officer may recover the profits of the office from him by an action of assumpsit for money had and received to his use."

It was held by the Court of King's Bench as early as 1725, in the case of *Attorney General* v. *Perry*, 2 Com. 481, as follows: "Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color and under an apprehension, though a mistaken apprehension, of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

In the case of *State* v. *Village of St. Johnsbury*, 59 Vt. 332, 10 Atl. 531, certain fines were paid by persons convicted in prosecutions under the liquor law to a justice of the peace of the Village of St. Johnsbury, and thus passed into the village treasury. The State of Vermont claimed that under the law it was entitled to these fines and sued the village for their recovery in an action of assumpsit. Here there was no privity in fact between plaintiff and defendant; third parties paid the money. The court held on this point, in a well considered opinion: "But it is said that assumpsit for money had and received will not lie, for that there is no privity between the State and the Village, as the latter received from third persons, and had retained the money in good faith, under an adverse claim of right and ownership. But in order to maintain this action, there need be no privity between the parties, nor any promise to pay other than what arises and is implied from the fact that the defendant had money in his hands belonging to the plaintiff that he

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has no right conscientiously to retain. In such case the equitable principle upon which the action is founded implies the promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable grounds for keeping it, the law creates the privity and the promise."

In the case of *Strough* v. *Board of Supervisors*, 119 N. Y. 212, 23 N. E. 553, a railroad company paid certain taxes to Jefferson county. Under the law these taxes should have been applied to the purchase of bonds of the town of Orleans issued to aid in the construction of the railroad, or to the purchase of other bonds to be held as a sinking fund for the redemption of said town bonds. The taxes in question were by mistake used for general county purposes. Strough, supervisor of the town of Orleans, instituted an action against the board of supervisors of the county of Jefferson to recover this money, in which a recovery was allowed. Here there was no privity in fact between the town and county; a third party paid the money. The court, in its opinion, said:

"The misappropriation of the taxes in question being conceded, there can, we think, be no doubt that an action would lie against the county in behalf of the town of Orleans to recover back the money misappropriated, on the principle upon which the equitable action for money had and received is founded. * * * It (the county) ought in justice to restore it and make good to the town what it has lost by its unauthorized act. To compel the performance of this duty, an action for money had and received is the appropriate remedy."

In *Bridges* v. *Supervisors of Sullivan Co.*, 92 N. Y. 570, property of a railroad company was assessed for taxes, 1874 to 1878 inclusive, in the county of Sullivan and the taxes were paid to such county. A statute directed these taxes to be paid to the town of Liberty. The county re-

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fused to pay same over to the town. Bridges, supervisor of the town, brought action against the county to recover the money. Here was no privity between the town and county; a third party paid the money. The court said:

"The only question here is, to whom *ex aequo et bono* do the specific moneys levied from the railroad corporations for county taxes during the years named belong. We think that they unquestionably belong to the town. The county has simply failed to collect a sufficient sum to pay its county charges during the several years during which it has unlawfully appropriated the moneys of the town to its own use. It should now refund them to the town, to whom the State gave them, and an action for money had and received is the appropriate remedy to accomplish this result."

In *Colusa County* v. *Glenn County*, 117 Cal. 434. 49 Pac. 457, Glenn county was formed out of a part of Colusa county. At the time of such formation there remained on the assessment roll of Colusa county taxes against property of a railroad company assessed while it was in Colusa county. A portion of these taxes were afterwards paid to Glenn county, whereas the whole of them should have been paid to Colusa county. The latter instituted action against Glenn county to recover such money. There was no privity here between the respective counties; a third party paid the money. A recovery was allowed and the court said:

"There can be no question, therefore, that the county of Colusa had the right to collect from the railroad company the taxes which were levied upon that portion of the road, which before the creation of the new county was within its limits; and Glenn county having received a portion thereof, cannot legally retain it. * * * The county of Glenn having received the money in question without any right, and not being entitled thereto, is liable upon an action for money had and received upon its implied promise

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to pay the same to the county of Colusa which was entitled thereto."

In *City of Salem* v. *Marion County*, 25 Ore. 449, 36 Pac. 163, certain taxes were paid by the tax-payers to the sheriff of Marion county. Under the law the taxes should have been paid to the street commissioner of the city of Salem. The city instituted action against the county to recover the taxes, which was allowed. Here there was no privity between the city and the county; third parties paid the money. The court said:

"The principle that an obligation rests upon all persons, natural and artificial to do justice, so that, if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation, is not questioned. *Chapman* v. *County of Douglas*, 107 U. S., 348, 2 Sup. Ct. 62, 27 L. Ed. 378. But it is claimed that there is no privity, statutory or contractual, between the county and city which would sustain an action for money had and received, and hence the county would not be justified in paying over the money in question to the city. As the street commissioner is an officer of the city and as such authorized to collect said taxes, he is agent of the city for their collection; and whether collected in work or money, such work must be performed or money expended upon the streets, alleys, or bridges of the city for the benefit of its inhabitants."

In *Humboldt County* v. *Lander County*, 24 Nev. 461, 56 Pac. 228, certain trackage of a railroad company was claimed by both counties to be within their limits and both counties assessed the property for taxation. The railroad company paid the taxes to Lander county and did not pay Humboldt county. The trackage was in fact in Humboldt county, but Lander county retained and refused to pay over the taxes to Humboldt county, hence the action by the latter against the former to recover them. The recovery

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was allowed. Here there was no privity between the counties; a third party paid the money. The court said:

"Where there is no privity, statutory or contractural, between a city and a county, where such county had collected money for taxes belonging to the city an action to recover the same would be sustained upon the principle that an obligation rests upon all persons, natural and artificial, to do justice, independent of any statute, so that if the county obtain money or property of others without authority of the law, it will be compelled to make restitution. * * * While it might be plain that those taxes were paid to Lander county under authority of law, yet the retention of the same, under the facts stipulated, was without authority of law, for it is shown that she had no right to tax the property in the first instance, and that the statute authorizing the payment to her by the Central Pacific Railroad Company conferred no such right; hence it can be truly said that the assessment, collection, and retention of the money were without authority of law, as her attempted exercise of the right of assessment and collection was without authority of law."

In the instant case the taxes were erroneously assessed by the State Corporation Commission in the county of Norfolk. But under the statute such error in assessment could not be corrected after thirty days from such assessment. They were not so corrected. Hence the assessment, although erroneous, was final, and the railroad and terminal companies, so far as they were concerned, were required by law to pay the taxes in question to the county of Norfolk, as they did. Such payment was a valid payment under the statute law of the State and the receipt of the county of Norfolk was a complete acquittance of the railroad companies of all further liability therefor. But the assessment in the county of Norfolk was in fact a mistaken one, the property being in fact within the limits of

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the city of Norfolk at the time of the assessment. The county was never, as a matter of right, entitled to such taxes. They of right belonged to the city at the time they were assessed and at the time they were paid. The county, therefore, cannot in equity and good conscience retain such taxes as against the city. Moreover, the city has no other remedy than to sue the county, since the said companies have received a full acquittance and discharge of their obligation for payment of the taxes in question by the payment which they made to the county. That is to say, there exists in the instant case the element of detriment to the plaintiff as a consideration to support the action.

Counsel for the county of Norfolk cite in their brief and rely upon the following cases:

Burton v. *Burton*, 10 Leigh (37 Va.) 597, in which the Treasurer of the United States paid money to the widow of a decedent instead of to his executor—the latter being the party alone entitled to receive it. In such case this court held that an action of *assumpsit* would not lie by the executor against the widow. Upon this subject Brooke, J., said:

"I think it well settled that where two persons claim, each in his separate right, the same sum of money from a third party, and the third party pays it to one of the claimants, the other cannot recover it from him who receives it. in this or in any other form of action; for there is no privity between them. Whether he can recover it from the third party, who has rejected his claim and paid the money to his successful competitor, is another question, which does not belong to this case."

Tucker, P., on the same subject, said: "If the merits of this case were with the plaintiff, I should still be of opinion that the action could not be maintained. If the executor of the pensioner, and not his widow, was entitled to

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his unpaid pension, then the payment to the widow by the government was a payment in its own wrong, and the executor may still justly demand payment to himself from the proper department. He cannot demand of the widow to pay over to him what she has received; for that was not his money. His money is in the hands of the government. What she received, she received as her own, claiming title to it as her own; and her claim being admitted and paid, she can never be compelled to refund. *Mayor, &c.* v. *Judah,* 5 Leigh (32 Va.) 305. And if the government cannot compel her to refund by direct action, it seems to follow that she cannot be, indirectly, compelled to refund, by being forced to pay over the amount to another claimant with pretensions adverse to her own. There is no privity between them, nor is there any ground on which to rest an implied contract. The reasoning of the court in *Rogers* v. *Kelly,* 2 Camp. 123, seems to me to be in point. The government and the widow cannot both be debtors of the executor. Now, if the payment was improperly made, the government is not discharged, and is still debtor to him. The widow, therefore, cannot be his debtor."

It will be observed that Judge Tucker directs attention to the fact that in that case the defendant was not paid and did not hold the money upon any right which could go upon or displace the original right of the plaintiff thereto. That is to say, the executor's claim against the government was not discharged or affected by the improper payment to the widow. The government was still debtor to the executor.

There are two aspects in which this case was correctly decided. First: The essential element of a *consideration* —in such a case a detriment to the plaintiff—from which alone the equity of the latter would arise, was absent. Second: In such a case the facts shown expressly to exist of two adverse claimants at the time the money was paid,

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under *bona fide* claims to the money dependent upon irreconcilably hostile rights thereto, not made hostile by any mistake or fraud, but so in their origin, which negatived any promise *in fact* and negatived also the existence of any duty upon which a promise might otherwise have been implied in law. It was a case in which *ex aequo et bono* the facts expressly proved negatived the existence of any demand upon the law to imply a promise.

The fiction of an implied promise will not be indulged in every case, but only where, in equity and good conscience, the duty to make such a promise exists. When the defendant has derived no right from the plaintiff, has not by mistake or fraud usurped or gotten the benefit of any original right of the plaintiff to the detriment or injury of the right of the latter, but relies upon a *bona fide* hostile claim or right, no such duty exists of the defendant to the plaintiff and the law will not indulge the fiction of the existence of an implied promise of defendant to plaintiff, for that would, in such case, be in itself inequitable. See 4 Cyc. p. 325.

The latter distinguishing feature, in a line of cases similar to that of *Burton* v. *Burton*, in which the right to maintain the action of *assumpsit* is generally, although not universally, denied by the courts, is considered in the very able opinion of Chief Justice Hornblower, in the case of *Sergeant* v. *Stryker*, 16 N. J. L. 464, 32 Am. Dec. 404, cited in brief of counsel for appellee. On this subject he says:

"There must, therefore, be some principle running through the cases, by which it can be known when *indebitatus assumpsit* will lie for money had and received, and when it will not. The rule cannot be arbitrary and the creditor at liberty to look to his immediate debtor, or to some other person who has got his debtor's money in his hands, at his election. Lord Mansfield says, in *Moses* v. *McFerlan*, 2 Burr. 1009, 'that there are numberless in-

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stances in which this action lies, for money the defendant has received from a third person, upon a claim of title to it, in opposition to the plaintiff's right;' but he adds, 'and which the defendant had by law, authority to receive from such third person.' This is no doubt true, and I think all the cases relied upon are such as go upon the plaintiff's title to the specific fund; or where the third person having lawfully paid over the money, the plaintiff has no remedy against him; and this I think will be found to be the true criterion in such cases."

In the conclusion of such opinion it is said: "Stryker cannot maintain this suit against the defendants below; they have got what does not belong to them; but that is no wrong to him. His right to the reward at the hands of the sheriff is as perfect as ever it was, and if he has released it, it is his own fault or misfortune. I see nothing to prevent the sheriff from recovering the money he has paid the defendants, if in fact they did not retake the prisoner."

But mere hostility of claim by the defendant at the time the action is brought by the plaintiff, or even at the time the money is received by the defendant, is not in itself decisive of the question we have under consideration. The very vital distinction involved in the case of *Burton* v. *Burton, supra,* and in like cases in which the defendant receives the money from a third person, or holds it upon a claim of right in opposition to the plaintiff's right, where the recovery by the plaintiff has been properly allowed or denied by the courts, is more clearly indicated in the case of *Sergeant* v. *Stryker, supra;* and that distinction is this: Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. That is to say, the plaintiff may recover whenever,

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but for the mistake or fraud, he would have had unquestioned right to the money. Such cases rest upon the plaintiff's original right to the fund, which right has been lost to the plaintiff or impaired by the mistake or fraud. Where the defendant received the money by a right which is independent in its origin from the original right of the plaintiff and in no way goes upon or displaces the latter, the recovery is properly denied. In such case the express facts negative any possibility of a promise of defendant to pay plaintiff anything, and equally negative any privity between their claims of right to the fund. Furthermore, no consideration exists on the part of the plaintiff to support the action.

Counsel for appellee cite also the following cases which contain the distinguishing features under consideration, namely: *Butterworth v. Gould*, 41 N. Y. 450; *Hathaway* v. *Homer*, 54 N. Y. 655; *Moore* v. *Moore*, 127 Mass. 22; *Cole* v. *Bates*, 186 Mass. 584, 72 N. E. 333.

Counsel for appellee take the position that the feature of "valid acquittance" which they emphasize in connection with their discussion of the foregoing cases cited and relied on by them, is one of fundamental importance, and they claim that the instant case contains this feature, and hence should be ruled by the decision of this court in *Burton* v. *Burton, supra,* and like cases cited in their brief. For the reasons stated above, we think this position on the law of the case is well taken, but applying such legal test we come to a different conclusion of fact from that of counsel for appellee. It seems clear to us that in the instant case the payment of taxes made by the railroad and terminal companies to the county of Norfolk was in accordance with the statute law of the State, and the assessment made in accordance with such law; and, hence, such payment was "a discharge of the tax debts" of these railroad companies so far as the railroads were concerned.

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It released them from all further obligation to any one. After such payment the railroads did not owe the city of Norfolk anything. The latter was not in the position of having two debtors, the railroad company and the county of Norfolk. The original right of the appellant to the taxes in question was displaced by the mistake in the assessment, and the failure of its correction within the thirty days allowed by law. This failure was due to mistake of both appellant and appellee existing at the time as to the true location of the property assessed. Thus the appellant's holding of the money supplants and rests upon the original right of the appellant which has been lost to the latter by the mistake aforesaid. Here the consideration exists from which the equity of the latter arises to support the action. That is to say, the instant case does not fall within the said line of cases cited and relied on by counsel for appellee.

It will be noted that in all of the cases cited above in this opinion in which it was held that the action of *assumpsit* would lie and as to which we give a brief statement of such cases, the initial payment was a discharge of the original debt, and the plaintiff had no remedy against any party with whom it was in privity in fact. We think the instant case falls within the latter line of authorities, among which is the decision of this court in the case of *Booker* v. *Donohoe, supra,* where the debts of those who paid fees to the *de facto* officers were discharged by such payment, and must be decided accordingly.

The two remaining cases cited, and relied on by counsel for appellee, of *Town of Rushville* v. *President of Town of Rushville,* 39 Ill. App. 503, and *City of Charleston* v. *Commissioners,* 52 Ill. App. 41, are upon their facts irreconcilable with the line of authorities we shall follow; but the decisions themselves seem to be placed by the opinions therein on the ground that the initial payment being due

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to the error of the officer making the payment, the original obligation was not discharged, as well as upon the ground of lack of privity between plaintiff and defendant. The court seemed to regard them as cases of payment by the officers receiving the money and does not go behind the officers to the parties who paid the money and regard the latter as paying the money as most similar cases do.

Further, as pointed out by counsel for appellant, these two cases are not decisions of the court of final resort in Illinois.

A number of other authorities are cited by counsel for appellant, and criticisms of some of them are made by counsel for appellee, and a reply to such criticisms is made in a reply brief of counsel for appellant, in which counsel on both sides of the case have evidenced a very extensive examination of the very interesting and important question of law involved in the instant case, and the able presentation of the diverse views of opposing counsel has been of great assistance to this court. All of these authorities have been examined, but it is believed that a further discussion of them would unduly prolong this opinion without throwing any additional light on the point of law involved.

For the reasons given above, the judgment complained of must be set aside and the case remanded to the court below for further proceedings to be had therein, not in conflict with this opinion.

Reversed.

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Richmond.

NORFOLK COUNTY WATER COMPANY v. ETHERIDGE.

January 11, 1917.

1. NUISANCES—*Number of Actions—Limitation of Actions.*—Repeated actions may, as a general rule, be brought to recover for nuisances as long as the nuisance continues; but where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.
2. WATERS AND WATERCOURSES—*Overflowing Lands—Damages.*—Defendant company built an enormous dam and reservoir across a natural watercourse. The lake of water formed by this structure interfered with the natural drainage to the plaintiff's land, and the water from the artificial lake backed upon plaintiff's farm, causing the injuries complained of. As the dam was a permanent structure and the injuries to the land flowing from it were not of a recurrent and intermittent character, but were permanent in their nature, there can be but one recovery for such injury, which would include all the damage sustained, both past and future, and there can be no recovery for damage to crops put out since the cause of action accrued, as such damages are included in the single judgment for permanent damages. But the damage to a crop which was put out during the construction of the dam and before its injurious effect was known, can be recovered.
3. WATERS AND WATERCOURSES—*Measure of Damages to Land From Dam.*—Where a dam causes permanent injuries to another's land, the measure of damages is the difference in the market value of the land with and without the dam, to be computed as of the time immedately before the dam was built and immediately after it was finished and filled with water.

Error to a judgment of the Circuit Court of Princess Anne county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

Pender & Way, for the plaintiff in error.

Robert W. Tomlin and *William G. Maupin*, for the defendant in error.

HARRISON, P., delivered the opinion of the court.

The plaintiff, W. T. Etheridge, brought this action to recover damages alleged to have been suffered in consequence of the defendant water company having built a dam which caused his lands to be permanently injured, and for the destruction of crops on such lands for the years 1912, 1913 and 1915. The case was conducted by the plaintiff in the lower court upon the theory that the injury was intermittent and recurrent, and that only such damages were recoverable as had been suffered prior to the institution of the suit. The instructions given by the court sustained this theory, and a verdict was rendered against the defendant company for $3,500 damage to the land, and for $1,000 damage to the crops for the three years mentioned. To this judgment the present writ of error was awarded.

The contention of the defendant company is that the dam complained of is a permanent structure and that the injury to the land is, as alleged, permanent in its character, and that there can be but a single action therefor, in which the entire damage suffered both past and future, must be recovered; that there can be no separate recovery for crops put out after the completion of the dam; and that to allow such a recovery would inflict upon the defendant the payment of damages twice for the one injury.

The law applicable to this case has been so repeatedly announced by this court, in recent decisions, that it is unnecessary to do more than cite the latest decision, where it is said: "Undoubtedly, repeated actions may, as a general

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rule, be brought to recover for nuisances as long as the nuisance continues; but where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued." *Worley* v. *Mathieson Alkali Works*, 119 Va. 862, 89 S. E. 880.

It appears from the record that the defendant company, for the purpose of supplying the public with water, built an enormous dam and reservoir across a natural water course known as "Gum Swamp." The lake of water thus impounded covers some four hundred and fifty acres of land belonging to the defendant, the entire structure being on its premises. This structure caused the Gum Swamp to be filled with water to such an extent that the natural drainage to the plaintiff's land was interfered with, and the water from the artificial lake or reservoir backed upon the plaintiff's farm, thereby causing the injuries complained of.

There can be no question that this is a permanent structure and we think that the evidence warrants the conclusion that the injuries to the land flowing from it are not of a recurrent and intermittent character, but are permanent in their nature, and in the normal course of things will continue indefinitely. The evidence shows that whether the water is above the spillway and overflowing or not, the ditches keep full, thereby backing the water upon the land, and further that the water is always under plaintiff's land, thereby making it sour, cloddy and unproductive. It is true that the water sometimes gets low in dry weather and the overflow ceases temporarily, but the menace of an overflow and destruction of crops is always present as shown by the repeated damage to crops.

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It is clear that if, as held, the dam in this case constitutes a permanent structure and from its nature must continue permanently to injure the land affected thereby, there can be but one recovery for such injury, which would include all the damage sustained, both past and future. It is conceded that the damage to the crop of 1912, which was put out during the construction of the dam and before its injurious effect was known, can be recovered in this action. There can, however, be no recovery for damage to crops put out since the plaintiff's cause of action accrued. Such future damages are included in the single judgment for permanent damages and the plaintiff cannot be twice subjected to the payment thereof.

In conclusion, we are of opinion that under the law and the facts of this case, the permanent damage to the land of the plaintiff, both past and future, must be recovered in this action, the measure of such damage being the difference in the market value of the land with and without the dam, to be computed as of the time immediately before the dam was built and immediately after it was finished and filled with water; that there can be no recovery for damage to the crops of 1913 and 1915, which were put out after the plaintiff's cause of action arose; and that the plaintiff can recover any damage shown to have been suffered by reason of injury to the crop of 1912.

Without considering the instructions objected to in detail, it is sufficient to say that they are based upon an erroneous view of the law applicable to this case, and were, therefore, highly prejudicial to the defendant company.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial in accordance with the views expressed in this opinion.

Reversed.

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Richmond

SHEPHERD AND OTHERS v. VIRGINIA STATE INSURANCE COMPANY AND OTHERS.

January 11, 1917.

Absent, Sims J. and Prentis, J.*

1. FIRE INSURANCE — *Insurance Fund — Foreign Insurance Companies.*—A domestic insurance company, holding a contract of reinsurance on risks outside of this State with a foreign company doing business in this State, is not entitled, in case of the latter's insolvency, to be classed as a policy holder and lienor under the provisions of section 17 (chapter 2) of the Virginia insurance act (laws 1906, c. 112). The general plan or scheme of that act was to provide that policies should be issued on property in Virginia only through regular agents residing in Virginia, and such policies only were intended to be protected by the deposit with the State Treasurer. The purpose of the legislature was to protect property owners in their fire insurance contracts, and not to protect other insurance companies on their contracts of reinsurance.
2. FIRE INSURANCE — *Contracts of Reinsurance — "Policy."* — Contracts of reinsurance are not infrequently designated as "policies," and they are doubtless properly so called; but, unless there is something in the context to indicate reinsurance, the use of the term "policy" in reference to fire insurance business naturally suggests, and will be understood as meaning, the far more usual and commonly known contract of insurance for the protection of a property owner against loss of his property by fire.

Appeal from a decree of the Circuit Court of the city of Richmond in a proceeding by the Insurance Commissioner against a foreign insolvent company.

Reversed.

The opinion states the case.

*Argued before Judge Prentis' term began.

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Loyall, Taylor & White, for the appellants.

George L. Christian, for the appellees.

KELLY, J., delivered the opinion of the court.

The question in this case is whether a domestic insurance company, holding a contract of reinsurance on risks outside of this State with a foreign company doing business in this State, is entitled, in case of the latter's insolvency, to be classed as a policy holder and lienor under the provisions of section 17 (chapter two) of the Virginia insurance act. That section is as follows:

"Upon the bonds deposited, as aforesaid, with the treasurer by any such insurance company, the holders of all policies of said company made with residents of this State, or upon property located in this State, shall have a lien for the amounts due them, respectively, under or in consequence of such policies, for losses, equitable values, return premiums or otherwise, and shall be entitled to be paid ratably out of the proceeds of said bonds if such proceeds be not sufficient to pay all of said policy holders; and whenever any such company depositing bonds, as aforesaid, shall become insolvent or bankrupt, or shall have made an assignment for the benefit of its creditors, any holder of such policy shall have a right to file a bill in the Circuit Court of the city of Richmond to enforce the said lien for the benefit of all the holders of such policies."

The essential facts are these: The American Union Fire Insurance Company, a Pennsylvania corporation doing business in the State of Virginia, deposited with the treasurer of the State, as required by the statute, bonds aggregating at their par value the sum of $25,000. In the course of its business a number of fire insurance policies were written by this company upon property in this State; and, in addition thereto, the company entered into a contract of

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reinsurance with the Virginia State Insurance Company, a Virginia corporation, whereby the former reinsured all the risks of the latter upon policies issued by it in the State of Alabama.

The American Union Fire Insurance Company subsequently became insolvent, and in the course of the litigation which followed, in the Circuit Court of the city of Richmond, the holders of the policies of fire insurance on properties in Virginia, and the Virginia State Insurance Company, respectively, presented their claims and asserted liens upon the bonds deposited with the State Treasurer. The commissioner, to whom the court referred the question of liens upon the bonds, reported adversely to the Virginia State Insurance Company, holding that its contract of reinsurance did not constitute it a policy holder within the meaning of the statute. The circuit court sustained an exception to the commissioner's report upon this point, and decreed that the claim of the Virginia State Insurance Company, as to $6,484.87, for fire losses paid by it in the State of Alabama before the failure of the American Union Fire Insurance Company, and as to $12,272.40 for unearned premiums on policies on Alabama properties in force at the time of the failure, aggregating the sum of $18,757.27, constituted a lien upon the bonds, and entitled that claimant to share ratably in the proceeds. Thereupon the holders of the fire insurance policies on Virginia properties obtained this appeal.

Two distinct propositions are relied upon by the appellants as grounds for a reversal of the decree. These propositions are, first, that, construing section 17 (chapter two) of the insurance act with reference to sections 1, 19, 31 and other sections thereof *in pari materia,* the policy holders therein protected are only such as hold policies on properties situated in Virginia; and, second, that the purpose of the section, as to fire insurance, was to protect only the holders

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of policies on property, and not an insurance company holding a contract of reinsurance on its risks under other policies of its own.

The arguments for and against both of these propositions have been urged upon us with earnestness and ability. We are inclined to agree with the appellants upon both propositions.

Section 1 of chapter 2, of the insurance act, provides that, "the words 'insurance company' or 'insurance companies,' as used in this act, shall be held to mean and to include any association * * * engaged in the business of assuming insurance risks upon persons or property in this State." The learned counsel for the appellee contend that the language just quoted does not mean that the property insured must be located in the State, but that it is the doing of such insurance business in the State which makes the insurance company subject to the act. We are unable to concur in this view. The language, so far as fire insurance is concerned, seems to us to be such as to limit the act to those companies only which write insurance policies upon property situated in this State. A broad view of the various sections of the act makes it clear, as we conceive, that the general plan, or scheme of this legislation was to provide that policies should be issued by foreign fire insurance companies on property in Virginia only through regular agents residing in Virginia, and that such policies only were intended to be protected by the deposit with the State Treasurer. The general impression thus obtained from a comprehensive view of the act as a whole is strengthened by a consideration of several of the specific provisions therein, but we content ourselves with this general reference to what seems to us to be the fundamental plan and purpose of the statute without any further discussion of its specific provisions because the case is even more plainly with the appellants upon their second

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contention, and we prefer to rest this decision mainly thereon.

The evident purpose of the legislature, as it sems to us, and the one naturally attributable to it, was to protect property owners in their fire insurance contracts, and not to protect other insurance companies on their contracts of reinsurance. The business of insurance is in itself of such a character as to have evoked, in the public interest, much special legislation looking to its control. The average individual property owner is uninformed as to many of the details of the business, and, for this and other reasons, is not in a position to judge of the solvency of any particular company. The danger of imposition upon its citizens by irresponsible companies is one of the controlling reasons for the enactment of such a provision as is found in section 17 of chapter two of the Virginia insurance act. Neither this nor any other reason which occurs to us would seem to bring within the purpose of the statute a corporation whose own sole or chief business is that of insurance.

It is true that reinsurance is a legitimate part of the business of an insurance company, and likewise true that a sound public policy would naturally lead every State to encourage and foster and endeavor to stabilize its resident insurance companies; but we cannot think the legislature ever contemplated as a possible result of section 17 of the Virginia act that a resident company would be permitted to bring a claim for fire losses and unearned premiums under a contract reinsuring its own risks in a foreign State into a ratable distribution of the proceeds of the bonds deposited, along with the holders of fire insurance policies protected in the act. Such a construction, in our opinion, might often result, as it would do in the case at bar, in nullifying to a very material degree the ruling purpose in the statute.

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We find nothing in the provision of the insurance act indicating any purpose to protect, by lien on bonds deposited by a foreign insurance company, any contracts except life insurance policies and fire insurance policies in the ordinarv acceptation of those terms. No reason is perceived why the Virginia State Insurance Company might not have made the contract for the reinsurance of its Alabama risks with any non-resident insurance company, regardless of whether it was licensed to do business in Virginia; or why such contracts should be the subject of any special protection by the legislature of this State.

Contracts of reinsurance are not infrequently designated as "policies" and they are doubtless properly so called; but unless there is something in the context to indicate reinsurance, the use of the term "policy" in reference to fire insurance business naturally suggests, and will be understood as meaning, the far more usual and commonly known contract of insurance for the protection of a property owner against loss of his property by fire. This is apparent from the manner in which the authorities discuss the two classes of contracts. See 1 Cooley's Insurance Briefs, pp. 516, 517.

The case of *German National Ins. Co.* v. *Va. State Ins. Co.*, 108 Va. 393, 61 S. E. 870, is relied upon by the appellee as authority for the contention that a contract of reinsurance is a policy within the meaning of section 17 of the insurance act. The only disputed questions in that case, so far as the opinion shows, related to the allowance of counsel fees. The claim asserted in the bill was upon a policy of reinsurance, the German National Ins. Co. having failed before a single fire insurance policy in the usual sense had been written by it for any resident of Virginia. No question seems to have been made as to the lien of the Virginia State Insurance Company in that case, and it passed unchallenged. The opinion of the court is devoted to the discussion of costs and counsel fees.

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We have not been cited to, and we have not found, a discussion of the exact question here involved in any text-book or judicial decision. The reason and the right of it seems to us to be with the appellants.

The decree appealed from will be reversed and the cause remanded to the circuit court for further proceedings to be had therein not in conflict with this opinion.

Reversed.

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Richmond.

STEIN AND OTHERS v. MORRIS AND OTHERS.

January 11, 1917.

Absent, Prentis, J.*

1. TRADE SECRETS—*Unfair Competition.*—Where one plan of banking is operated upon a mutual basis, the members or borrowers subscribing to the capital stock and participating in the profits and losses; while the other is operated upon a fixed capital, the stockholders being the managers and proprietors of the banking institution, and the borrowers and savers not participating in the profits and losses, the two plans are not substantially similar.
2. PROPERTY—*Ideas.*—Where one originated an idea or scheme of banking, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind.
3. PRIVILEGED COMMUNICATIONS—*Attorney and Client.*—No communication to a lawyer for the express purpose of having it brought to the attention of the public, or communicated to another, is privileged.
4. PRIVILEGED COMMUNICATIONS—*Attorney and Client.*—Plaintiff had united with others in organizing a banking association through which he made known to the public his so-called scheme and method of doing business. Several years afterwards he approached defendant, an attorney, with the request that he would unite with him in organizing a similar association in another city. Defendant did unite with plantiff in an effort to organize such a company, but the effort resulted in failure. The scheme was not committed to defendant in confidence; on the contrary, the very thing he was asked to do necessarily involved his discussing plaintiff's plan and making it known to the public. It was held that there was no violation by the defendant of professional confidence when the defendant eventually established a scheme somewhat similar.

* Submitted before Judge Prentis took his seat.

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Appeal from the Circuit Court of the city of Norfolk. Decree for defendants. Complainant appeals.

Affirmed.

The opinion states the case.

S. M. Brandt, for the appellants.

Hicks, Morris, Garnett & Tunstall, and *Garland F. Stone* (N. Y.), for the appellees.

HARRISON, P., delivered the opinion of the court.

This bill in equity was filed by the appellant, David Stein, asking for an accounting and praying for an injunction to restrain the appellees, Arthur J. Morris, the Fidelity Corporation of America, and the Industrial Finance Corporation, from appropriating or using the plan of banking known in this record as the "Morris Plan of Industrial Banking," of which the complainant claims to be the owner.

It appears from the record that in March, 1910, A. J. Morris, one of the appellees, together with several associates, organized in the city of Norfolk the Fidelity Savings and Trust Company, Inc., which began in May, 1910, to conduct the business of a loan and savings company for the accommodation of people of small means who could not get accommodation from the ordinary commercial banks. This corporation prospered to such an extent that by the end of the first year the financial soundness of the principle on which it operated was demonstrated, and other similar institutions were established in different parts of the country. In the summer of 1912 it was found that an extensive development of this system of banking would require a larger capital, and the Fidelity Corporation of America was thereupon organized with an authorized capital of $300,000. To this company Morris and his associates con-

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veyed all of their rights in the business theretofore conducted by them of organizing such institutions. These industrial banks grew so rapidly that in July, 1914, Morris and his associates organized in the city of New York the Industrial Finance Corporation with a capital stock of $1,500,000, to which the Fidelity Corporation of America transferred all of its assets of every character, together with the good will of the business which it had theretofore conducted of organizing banks on the plan which had then become known as the "Morris Plan of Industrial Banks." The record shows that at the time of the institution of this suit these industrial banks had been established in many localities throughout the United States.

In addition to the capital invested in the Industrial Finance Corporation, approximately $7,000,000 has been invested in the capital of the numerous operating banks that have been established by that corporation. It is this business that the appellant, five years after the movement began, seeks to restrain and call to account, upon the ground that he is the originator of the instalment plan of industrial savings and loan banking, and that the use of his idea by the appellees is wrongful and prejudicial to his rights.

It appears that in April, 1901, appellant and a number of associates organized in Newport News, Virginia, a corporation known as the "Merchants and Mechanics Savings Association," for the purpose of prosecuting the business of savings and loans in the city of Newport News. The claim alleged is that this institution and a certain table and letter filed with the bill constitutes an unique plan of lending to poor people money, returnable in weekly instalments and reinvesting these weekly instalments, which is owned exclusively by the appellant, and that the same idea has been adopted by the appellees in their plan of establishing industrial banks.

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It is, we think, clear from the evidence that the respective plans of banking under consideration are not substantially similar, but are fundamentally different. The two plans are clearly differentiated by experts showing that one is operated upon a mutual basis, the members or borrowers subscribing to the capital stock and participating in the profits and losses; while the other is operated upon a fixed capital, the stockholders being the managers and proprietors of the banking institution, and the borrowers and savers not participating in the profits and losses. The appellant contends that the letter and table filed with his bill show that his plan is substantially the same as the "Morris plan." This contention cannot be sustained. The wording of the letter plainly conveys the idea that the plan was mutual in its character. This interpretation of the letter is sustained by the by-laws of the "Merchants and Mechanics Savings Association," which admittedly embody appellant's whole scheme and plan of banking. The table merely shows a simple calculation of profits to be derived from a given sum in accordance with the "Stein plan," the theory being that the periodical payments and interest would be immediately re-loaned on similar terms.

The evidence of those who united with the appellant, Stein, in organizing the Merchants and Mechanics Savings Association of Newport News, which he claims to be the sole and complete embodiment of his system, is overwhelmingly to the effect that the scheme was not original but was an old one which had been in operation in Europe for many years, and that Stein acquired his knowledge of the system in Europe from whence he emigrated to America in 1892. The witness, Rosenbaum, who was an active officer of the Newport News corporation, says he never heard of any scheme of proprietorship from the organization of the company in 1901 until about 1914. This testimony of Stein's own witness, who was in a position to know, would alone seem to be sufficient to show that the present claim of in-

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vention and property was conceived after Stein had seen the unusual growth and prosperity of the "Morris plan."

If, however, appellant had originated the scheme or idea of banking of which he claims to be the owner, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind. *Bristol* v. *E. L. A. Society*, 52 Hun. 161, 5 N. Y. Supp. 131; *Burrell* v. *Chown* (C. C.), 69 Fed. 993; *Bristol* v. *E. L. A. Society*, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; *Hamilton Mfg. Co.* v. *Tubbs* (D. C.), 216 Fed. 401.

In *Bristol* v. *E. L. A. Society*, 52 Hun. 161, 5 N. Y. Supp. 131, *supra*, it is said: "It is difficult to conceive how a claim to a mere idea or scheme, unconnected with particular physical devices for carrying out that idea, can be made the subject matter of property. So long as the originator of the naked idea, whether, germinating under the laws of metaphysics, it be regarded as Platonic or Cartesian in its make-up, keeps it to himself, it is his exclusive property, but it ceases to be his own when he permits it to pass from him." As further said in the case cited, such ideas in their relation to property, belong to the claimant as long as he keeps them. But if he permits them to go he cannot follow them.

In *Hamilton Mfg. Co.* v. *Tubbs*, *supra*, it is said: "Where an idea or trade secret or system cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure; otherwise, it must follow the law of ideas and become the acquisition of whoever receives it."

In the case of *Haskins* v. *Ryan*, 71 N. J. Eq. 575, 64 Atl. 436, a leading authority on the subject, the court, in a luminous discussion of this subject, says: "The means of carrying out the plan, of giving effect to the idea, lay, therefore,

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beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called property. It lacks that dominion, that capability of being applied by its originator to his own use, which is the essential characteristic of property. It differs fundamentally from the secret process or patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys* v. *Boosey,* 4 H. L. Cas. 965, *'Volat irrevocable verbum,'* whether borne on the wings of the wind or the press, the supposed owner instantly loses all control over it. * * * He has produced the thought and given it utterance, and *eo instanti* it escapes his grasp."

The contention of complainant that he imparted his plan or scheme of banking to Morris, as his attorney, in confidence and with a restriction against his using the same, and that Morris violated such professional confidence when he established the "Morris plan" is not tenable. It appears that several years after Stein had united with others in organizing the Merchants and Mechanics Savings Association of Newport News, through which organization he made known to the public his so-called scheme and method of doing business, he approached Morris with the request that he would unite with him in organizing a similar savings association in the city of Norfolk. Morris did unite with Stein in an effort to organize such a company, but the effort resulted in failure, and thereupon Morris' connection with the matter and with Stein ended. The preponderance of the evidence shows that no scheme was committed to

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Morris in confidence; on the contrary, the very thing he was asked to do necessarily involved his discussing Stein's plan and making it known to the public. This Stein did himself and in no other way could a company have been established in Norfolk or elsewhere.

No communication to a lawyer for the express purpose of having it brought to the attention of the public, or communicated to another, is privileged. Weeks on Attorneys at Law (2nd ed.), sec. 151; *Bartlett* v. *Bunn*, 56 Hun. 507, 10 N. Y. Supp. 210; *Commonwealth* v. *Bacon*, 135 Mass. 521. It is true that an attorney should be held to the highest good faith in dealing with a client, but it is obvious, in the present case, that the charges of disloyalty on the part of Morris, if he ever was attorney for Stein, are wholly without merit.

The appellees have urged upon us other grounds of defense to the claim asserted by the appellants, but in the view we have already taken of the case it is not necessary to refer to them.

In conclusion, we are of opinion that the claims of the appellants are without foundation in law or in fact, upon any view of the case. The decree complained of, denying the relief prayed for, is, therefore, plainly right and must be affirmed.

Affirmed.

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Syllabus.

Richmond.

VIRGINIA RAILWAY AND POWER CO. v. WALTER C. HILL.

January 11, 1917.

Absent, Prentis, J.*

1. STREET RAILWAYS—*Collision.*—An action was brought by plaintiff to recover for injuries sustained in a collision at a crossing between a street car and a taxicab in which he was riding. Under an ordinance the automobile had the right of way at the point where the accident occurred. There was a conflict in the testimony as to the rate of speed at which the street car and the automobile were respectively running. The trial court instructed the jury that even though they believed from the evidence that the driver of the automobile was guilty of negligence, yet if they further believed from the evidence that before the accident occurred, the motorman ran his car into the automobile as the result on his part of some act of negligence charged in the declaration, and that this was the proximate and immediate cause of the accident, then the defendant was alone responsible for the accident.

   Held: That the evidence was such as to render proper a submission by the trial court to the jury of these three leading questions of fact: (1) Were both defendants guilty of negligence which concurred as proximate causes of the accident? or (2) Was the defendant railway company guilty of negligence which was the sole proximate cause? or (3) Was the taxi company guilty of negligence which was the sole proximate cause? And that the first and third of these questions were sufficiently presented in other instructions given by the court, and that the second was properly presented in the instruction quoted above.

2. INSTRUCTIONS—*Unnecessary Words.*—The words in the above instruction "before the accident occurred," were unnecessary, but there was nothing in them which could have deceived the jury as to what the trial court meant, and therefore they did not render the instruction erroneous.

3. INSTRUCTIONS.—The trial court was asked to instruct the jury that they were not required to believe incredible testimony. As this instruction asserted a self-evident proposition, the refusal to give it was no error. Juries do not need, or at least must be presumed not to need, as a matter of instruction and

*Submitted before Judge Prentis took his seat.

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information, to have the court tell them that they are not to believe the impossible.

4. STREET RAILWAYS—*Instructions.*—The trial court refused to give on behalf of the street railway company an instruction which in substance told the jury that the taxicab company owed the plaintiff, as a passenger, the highest degree of care, and that the railway company owed him only the duty of exercising ordinary care. This was held no error. So long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its codefendant. Other instructions properly fixed the burden of proof and defined the degre of care so far as the railway company was concerned, and this was the sole test of its liability, regardless of how much care the taxi company owed the plaintiff, or how little care it exercised for him.

5. INSTRUCTIONS—*Tort-Feasors.*—If one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instruction simply tends to benefit the former without unduly incupating the latter.

6. INSTRUCTIONS—*Refusal Where Covered by Others.*—It is not error to refuse instructions prolix in their statements and less helpful to the jury than one given by the court, and in so far as they were proper, covered by other instructions given in the case.

7. STREET RAILWAYS—*Collision—Instructions.*—Under a city ordinance a taxicab had the right of way at a crossing over a street car. The trial court instructed the jury that they must give a reasonable application to said ordinance, and that the street cars were not required to stop for vehicles having the right of way, unless in the exercise of ordinary care and prudence a prudent motorman would deem it necessary to stop his car under all the circumstances at the time.

Held: A correct interpretation of the ordinance.

8. PERSONAL INJURIES—*Measure of Damages.*—In an action for personal injuries, the jury were instructed that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries." There was evidence that plaintiff was in the hospital for three weeks, and thereafter for six weeks he was only able to spend a part of each day at his place of business. It did not appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence. The instruction was held not prejudicial error warranting a reversal where the other elements of damage were all properly set out.

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9. DAMAGES—*Instructions.*—When an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But this general rule will not be carried so far as to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, *"De minimis lex non curat."*

Error to a judgment of the Hustings Court, Part II, of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

H. W. Anderson, A. B. Guigon and *T. J. Moore,* for the plaintiff in error.

Nelson & Nelson and *Gunn & Mathews,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

This action was instituted by Walter C. Hill against the Virginia Railway and Power Company and the Virginia Taxi Service Company, to recover damages for a personal injury sustained by him in a collision between a street car and an automobile. The street car was owned and operated by the railway company, and the automobile by the Taxi Service Company. The plaintiff was a passenger in the latter vehicle.

The jury found for the taxi company, but against the railway company; and, to a judgment for the plaintiff on that finding, the railway company brings this writ of error.

The accident occurred in Richmond on February 16, 1914,

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about midnight. The plaintiff had been drinking, and his son, E. Raymond Hill, was taking him home from a downtown restaurant in an automobile which he had ordered for that purpose from the taxi company, a corporation engaged in carrying passengers for hire. This automobile was going west on Grace street on the way to the plaintiff's home, with him and his son as passengers, when, at the intersection of Grace and Laurel streets, it was struck by the street car, which was going north on Laurel street, crossing Grace at right angles. The automobile was wrecked and both passengers were injured. The chauffeur seems to have escaped unhurt. The other facts, in so far as they may be essential to this discussion, will appear in connection with the several assignments of error.

The first of these assignments challenges the correctness of the following instruction, given at the instance of the defendant taxi company.

"The court instructs the jury that, even though you may believe from the evidence the driver of the automobile was guilty of negligence, yet if you further believe from the evidence that before the accident occurred the motorman in charge of the street car of the Virginia Railway and Power Company ran his car into the automobile as the result on his part of some act of negligence charged in the declaration, and that this was the proximate and immediate cause of the accident, then the Virginia Railway and Power Company is alone responsible for the accident, even though you may believe from the evidence that the accident could not have occurred but for the remote neglect of the driver of the automobile."

It is conceded that this instruction, in the main and in the abstract, correctly states the established doctrine as to remote and proximate cause; but the claim is made, first, that the instruction was without evidence to support it, and, second, that the words "before the accident occurred" rendered it misleading and confusing to the jury. We will consider these two objections in the order named.

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Under the terms of the traffic ordinance, hereinafter quoted in full, the automobile had the right of way at the point where the accident occurred. The motorman, as he traveled north on Laurel street, and reached a point 85 feet from the exact spot where the collision took place, could, if he looked, see down Grace street in an easterly direction 52 feet; at 65 feet from that spot he could see down Grace 120 feet; and at 51 feet from that spot he could see all the way down Grace to the end of the block. He could stop his car, when running as he claimed to be at that time, in a distance of about 40 feet. There was a conflict in the testimony as to the rate of speed at which he and the chauffeur, respectively, were running, and as to the distance within which he did in fact stop his car. As to the weight of the testimony, we can have nothing to say. It is difficult to understand how the accident could have occurred at that point at all, except by a concurrence of negligence on the part of the motorman and the chauffeur; but, without going further into the details of the evidence, we deem it sufficient to say that a careful consideration of it all satisfies us that it was such as to render proper a submission by the trial court to the jury of these three leading questions of fact: (1) Were both defendants guilty of negligence which concurred as proximate causes of the accident? or (2) Was the defendant railway company guilty of negligence which was the sole proximate cause? or (3) Was the taxi company guilty of negligence which was the sole proximate cause?

The first of these questions was sufficiently presented in an instruction for the plaintiff to which no objection is here made.

The second question was properly presented in the instruction quoted above; and the third was submitted in the following instruction given at the railway company's request:

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"The court instructs the jury that even though they may believe from the evidence that the motorman of the street car was guilty of negligence, yet if they further believe from the evidence that the chauffeur in charge of the automobile of the Virginia Taxi Service Co., Inc., negligently ran his automobile so as to render the accident unavoidable and that this was the proximate and immediate cause of the accident, then the Virginia Taxi Service Co., Inc., is alone responsible for the accident, even though the jury may believe from the evidence the accident could not have occurred but for the remote negligence of the motorman of the street car."

The court having fairly submitted these three main questions of fact to the jury by instructions which, when read together, could not have tended to unduly emphasize the liability of the railway company, the objection to the instruction under consideration, based upon a lack of evidence to support it, must be overruled.

Nor do we think the instruction was subject to any valid objection because of the words, "before the accident occurred," which appear therein. We are unable to see how any confusion or misunderstanding could have been produced in the minds of the jury by these words. That they were unnecessary, and that the instruction would have been in better form without them, may be conceded; but there is nothing in them as they stand which could have deceived the jury as to what the trial court meant, and there is nothing in the evidence to which they might reasonably have been applied with any misleading effect.

The second assignment of error calls in question the action of the court in refusing to give, at the instance of the railway company, the following instruction:

"The court instructs the jury that they are not required to believe incredible testimony, and if they believe from the evidence that the street car was going northwardly along Laurel street where it could have been seen by the chauffeur

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had he looked, as it was his duty to do, then the jury are not bound to accept the testimony of the chauffeur that he did look, but did not see the car."

This instruction asserts a self-evident proposition, and involves no possible principle of evidence which any competent juryman would not be presumed to understand. Juries do not need, or at least, must be presumed not to need, as a matter of instruction and information, to have the court tell them that they are not to believe the impossible. Sometimes their verdicts indicate that they have done so, and are set aside accordingly as being without evidence to sustain them. But there is no duty on the court to presume that a jury will believe what manifestly cannot be true, and to warn them against such belief. There may be cases in which it would not be error to give an instruction similar to the one here in question, but there can hardly be a case in which it would be error to refuse such an instruction, unless it would also be error to refuse to set aside an adverse verdict in the case for want of evidence. (See *Southern Ry. Co.* v. *Mason,* 119 Va. 89 S. E. 225.) In this case we think the instruction was properly refused. It ignores certain facts and circumstances in the evidence tending to corroborate the testimony of the chauffeur and to show that the statement assailed in the instruction may have been true.

It is urged, as a third ground for the reversal of the judgment, that the trial court erred in refusing to give, on behalf of the railway company, two instructions which in substance told the jury that the taxi company owed the plaintiff, as a passenger, the highest degree of care, and that the railway company owed him only the duty of exercising ordinary care. Some of the counts in the declaration charge the defendants with concurring negligence, and allege their respective duties to the plaintiff substantially as set out in the two instructions in question.

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We are unable to endorse the contention made on behalf of the railway company to the effect that these instructions state "a propostion of law vitally important to the plaintiff in error, namely, the relative degrees of care required of each defendant." So long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its co-defendant. Other instructions properly fixed the burden of proof and defined the degree of care so far as the railway company was concerned, and this was the sole test of its liability, regardless of how much care the taxi company owed the plaintiff, or how little care it exercised for him. As to the railway company's liability, the case is not in the least different from what it would have been if the relationship of carrier and passenger had not existed between the chauffeur and the plaintiff. As Judge Keith said in *Carlton* v. *Boudar*, 118 Va. 521, 529, 88 S. E. 174, 177, referring to an injury resulting from a collision between an automobile owned by a private individual and one owned by a carrier, the plaintiff being a passenger in the latter, "the fact that two defendants are joined upon whom the law imposes different degrees of duty to the person injured, is not material, and if each of the defendants have been guilty of negligence, it matters not that one may have been more negligent than the other." If the *plaintiff* had asked for an instruction defining the taxi company's duty and it had been refused, he would have had the right to except; but not so with the co-defendant railway company, the rule being, as held in *Walton, Witten & Graham* v. *Miller*, 109 Va. 210, 220, 63 S. E. 458, 152 Am. St. Rep. 908, that all persons whose negligence contributed proximately to a tort are jointly and severally liable with no right of contribution among them or remedy over by one against the other, and that consequently the party injured may bring his action in the out set against either or all, or, having begun it

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against all, may thereafter abandon it as to some while pursuing it as to others.

This court is entirely in accord with the contention of counsel for the railway company that in cases of this character, if one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except. Any other rule would be indefensible. But we have no such case here. The alleged error complained of in this assignment simply tended to benefit the taxi company, not to unduly inculpate the railway company.

The fourth assignment of error complains of the action of the court in refusing four instructions requested by the railway company and giving in lieu thereof the following:

"The jury are instructed in determining the question of negligence they may consider the fact that the ordinances of the city of Richmond, Virginia, provide that all vehicles and street cars going in an easterly or westerly direction shall have the right of way over all vehicles or street cars going in a northerly or southerly direction. But the court further tells the jury that they must give a reasonable application to said ordinance, and that street cars going north and south on Laurel street are not required to stop and wait for vehicles going east and west on Grace street, unless in the exercise of ordinary care and prudence a prudent motorman would deem the stopping of his car necessary under all the circumstances at the time of the approach to Grace street."

This instruction, and the four in place of which it was given, all had their origin in the fact that one count in the declaration charged the railway company with a violation of section 21 of the traffic ordinance of the city of Richmond, which is as follows:

"Vehicles and street cars going in an easterly or westerly direction shall have the right of way over all vehicles or street cars going in a northerly or southerly direction."

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The instruction appears to us to be a clear and practical interpretation of the ordinance and one which sufficiently covered the requirements of the case. The four instructions refused, taken altogether, were prolix in their statements, and would have been less helpful to the jury than the one given by the court, and, in so far as they were proper, they were either covered by it or by other instructions given in the case.

Finally, it is contended that there was error in that portion of the instruction on the measure of damages which told the jury that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries."

The argument in support of this assignment is based upon the want of evidence to show any actual pecuniary loss to his business resulting from his loss of time. The evidence shows that the plaintiff was in the hospital for three weeks, and that thereafter for six weeks he was only able to spend a part of each day at his place of business. It does not affirmatively appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence; but we cannot feel that, under the circumstances here, there was any such prejudicial error in the instructions as would warrant a reversal of the judgment. The other elements of damage, to-wit, physical and mental suffering and shock, their effect upon the condition of his health, and whether permanent or temporary, and the expenses incurred by reason of his injuries for medical treatment, were all properly set out in the instruction, and the evidence as to these other elements of damage is such as to leave little room to doubt that they overshadowed in the minds of the jury the mere loss of a few weeks' time which the plaintiff had "theretofore sustained." His injuries were of a dangerous, grievous and permanent nature, and counsel for the railway company concede that the evidence in this respect would have supported even a much

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larger verdict. If there was liability on the defendant, the verdict for $5,000 was in all probability very little if at all affected by any consideration of three weeks' total loss and six additional weeks' partial loss of time from a business the character and extent of which was not shown to them in the evidence. We fully appreciate and recognize the general rule that when an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But we are unwilling to carry the application of this general rule far enough to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, *de minimis non curat lex.*

A large number of instructions appear to have been requested. The court gave three as offered for the plaintiff, two for the taxi company, four for the railway company, one on its own motion, and refused the others. The instructions given fully and fairly cover every phase of the case so far as the railway company's liability is concerned, and we are of opinion that the verdict was supported by sufficient evidence, and that the judgment must be affirmed.

Affirmed.

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Richmond.

VIRGINIA RAILWAY AND POWER CO. v. E. RAYMOND HILL.

January 11, 1917.

Absent, Prentis, J.*

1. DAMAGES—*Personal Injuries.*—A verdict for $1,000 will not be set aside as excessive where plaintiff received a cut in the face near his eye and an injury to his arm, and where he complained of constant pain from the injury to the eye and of trouble in moving and using his arm more than nine months after the accident.

Error to a judgment of the Hustings Court, Part II, of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

H. W. Anderson, A. B. Guigon and *T. J. Moore,* for the plaintiff in error.

Nelson & Nelson and *Gunn & Mathews,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

This is a companion case to that of *Virginia Railway and Power Company* v. *Walter C. Hill,* 120 Va. 397, in which an opinion is handed down today affirming the judgment

*Submitted before Judge Prentis took his seat.

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complained of. The two cases were, by agreement, tried jointly by the same jury, separate verdicts, however, being returned. In the present case the verdict was for $1,000; and the only question, not passed on in the *Walter C. Hill Case*, which we are called upon to decide, is whether the trial court erred in refusing to set aside the verdict on the ground that the amount was excessive.

The plaintiff fell or was thrown from the automobile and received a cut in the face near his eye, and an injury to his arm. He said at the trial: "I have pain constantly even from the night of the accident, haven't stopped a minute, from my left eye, and my arm troubles me very often;" also that he continued to have trouble in moving and using his arm, couldn't carry it straight, couldn't raise it above his head without pain, and that it seemed to be getting worse. This testimony was given by him more than nine months after the accident. That we cannot interfere with the verdict as being excessive is perfectly clear under the well-established rule in this State. *Richmond Ry. & Elec. Co.* v. *Garthright*, 92 Va. 626, 635, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839.

The judgment must be affirmed.

Affirmed.

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Richmond.

WALKER v. WALKER.

January 11, 1917.

1. DIVORCE—*Desertion.*—Testimony that a wife left of her own accord; that her husband gave her no cause to leave him; "that she just got tired, and decided to leave, and left," will not warrant a divorce *a vinculo matrimonii.*
2. DIVORCE—*What Constitutes Desertion.*—The desertion, to justify a decree for an absolute divorce, must be a willful desertion, and the court to which the evidence is submitted can only determine whether or not such desertion is willful by having all the facts and attendant circumstances fully and frankly presented.
3. DIVORCE—*Evidence of Desertion.*—The evidence in a suit for divorce for desertion should show all of the circumstances immediately preceding the separation; such as, whether the departure was secret or open, whether it was accompanied by any threat to remain away or by promises to return, and every other pertinent declaration or circumstance to enable the court to determine whether or not the desertion was willful. It should also show the events immediately succeeding the separation, such as the efforts, if any, to ascertain the new place of residence of the consort complained of, as well as the efforts at reconciliation, if any, of either of the parties. The policy of the law is against divorce by consent, and if the sanctity of the marriage tie is to be preserved and divorces by consent prevented, full and satisfactory evidence should be required, so that the court may determine the legal questions involved from the facts presented, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse.

Appeal from a decree of the Corporation Court of the city of Danville. Decree for defendant. Complainant appeals.

Affirmed.

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The opinion states the case.

Harry Wooding, Jr., for the appellant.

No appearance for the appellee.

PRENTIS, J., delivered the opinion of the court.

This is an appeal from a decree denying the prayer of the appellant for a decree of divorce *a vinculo matrimonii*.

The allegation of the bill is that the appellee "willfully abandoned and deserted the appellant without just cause or excuse therefor, and still continues in such desertion and abandonment."

The evidence is meagre and consists of the deposition of the appellant, to the effect that his wife left him of her own accord; that he gave her no cause to leave him; that she just got tired and decided to leave and left; that he provided for her support while they were living together; that she left about four years prior to the time he testified; and that the last place of her residence that he knew of was North Carolina.

Another witness, who it appears was less than twenty-one years of age at the time of the occurrence as to which he testifies, says that she left him without any cause, so far as he knows; that she just left him because she wanted to; and that so far as he knew the husband gave her no cause for doing so.

Another witness testified that he always thought that he made her a good husband and provided for her the best he could, but 'she seemed to have got tired of him and just left' for no cause that he knew of.

Upon this testimony the judge of the lower court was of opinion that the evidence was not sufficient to entitle the plaintiff to the decree which he prayed for.

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We agree with this conclusion. The desertion to justify a decree for an absolute divorse must be a willful desertion, and the court to which the evidence is submitted can only determine whether or not such desertion is willful by having all the facts and attendant circumstances fully and frankly presented. It is difficult to find an event which stands alone entirely unconnected with previous events. The evidence in such a case should show all of the circumstances immediately preceding the separation—such as, whether the departure was secret or open, whether it was accompanied by any threat to remain away or by promises to return, and every other pertinent declaration or circumstance to enable the court to determine whether or not the desertion was willful. It should also show the events immediately succeeding the separation, such as the efforts, if any, to ascertain the new place of residence of the consort complained of, as well as the efforts at reconciliation, if any, of either of the parties. The policy of the law is against divorce by consent, and if the sanctity of the marriage tie is to be preserved and divorces by consent prevented, full and satisfactory evidence should be required, so that the court may determine the legal questions involved from the facts presented, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse.

A separation by mutual consent, or because of the fault of either of the parties, may be just as well inferred from the evidence submitted in this case as a desertion by the wife, and it falls far short of proving the allegations of the bill.

For these reasons the decree complained of will be affirmed.

Affirmed.

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Richmond.

WESTERN UNION TELEGRAPH COMPANY v. L. J. BOLLING.

January 11, 1917.

1. TELEGRAPHS AND TELEPHONES—*Interstate Commerce.*—The transmission of intelligence by wire is commerce, either State or interstate.
2. TELEGRAPHS AND TELEPHONES—*Interstate Commerce.*—Telegraph and telephone companies are common carriers under the express provisions of the act of Congress to regulate commerce. The transmission of telegraphic messages between points within the State, which, in the course of their transmission, pass without the State into another State, or the District of Columbia, is interstate commerce.
3. TELEGRAPHS AND TELEPHONES—*Statutory Penalty—Negligence Within the Sate.*—While formerly it was held that though the message be interstate commerce, under certain conditions, in clear cases of negligence occurring within this State, the statutory penalty (Code, 1904, section 1294-h, clauses 5, 6) might be enforced, since the amendment of the act to regulate commerce of June 18, 1910, Congress having occupied the field of regulation with respect to interstate telegrams, the statute can no longer be invoked in such cases.
4. TELEGRAPHS AND TELEPHONES—*Limitation of Liability.*—Common carriers may limit their liability in interstate commerce by regulations contained in their published tariffs filed with and approved by the Interstate Commerce Commission, and such regulations supersede State statutes and policies and furnish the exclusive rules for determining the carriers' liability. So where telegraph companies undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, these conditions, until disapproved by the Interstate Commerce Commission, furnish the exclusive rules for determining their liability, subject to the federal statutes and general law, any State statute to the contrary notwithstanding.

Error to a judgment of the Corporation Court of the city of Newport News in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

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The opinion states the case.

Hughes, Little & Seawell, for the plaintiff in error.

J. Winston Read, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This is an action for the recovery of the statutory penalty (Code, 1904, sec. 1294-h, cl. 5, 6) and damages for an error in the transmission, which caused delay in the delivery, of a telegram sent on August 4, 1915, from L. J. Bolling, at Newport News, Va,, to C. W. Bloxom, at Nassawadox, Va., reading as follows:

"Meet me at Cape Charles instead of Cheriton about nine morning."

Nassawadox is a small place upon the line of New York, Philadelphia and Norfolk Railroad, in Northampton county, on the Eastern Shore of Virginia. Because of the fact that the Chesapeake Bay lies between the Eastern Shore and the rest of the State, the only existing method of transmitting a message from Newport News to Nassawadox is by relaying it through the States of Maryland and Pennsylvania, and then down the Maryland and Virginia peninsula. There is no telegraph office at Nassawadox, so that under the custom of the company it was sent to Exmore, from which point it was telephoned to Nassawadox.

The mistake made was in changing the name of the addressee from C. W. Bloxom to W. N. Bloxom. The relayed messages show that the initials were correct at Newport News and Richmond, but show a change in the Washington relay to Philadelphia.

The message was sent subject to the usual conditions undertaking to limit the liability of the company printed on the telegraph blank.

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The jury found a verdict for $100 only, and added nothing for additional damages.

Error is alleged in the failure of the court to give an instruction based upon the claim that this was an interstate message, and that Congress having legislated with reference to telegraph companies while engaged in interstate business, the penalty for dereliction of duty imposed by the State statute cannot be enforced as to such a message. The court was also asked to grant an instruction, to the effect that if the service in the State was without fault, the court was without jurisdiction to impose the penalty for a default occurring without the State and in the city of Washington, D. C.

These facts and the alleged errors naturally direct our minds to the consideration of three questions, each of which seems to be concluded by the authorities.

1. That transmission of intelligence by wire is commerce, either State or interstate, is definitely settled and no longer questioned. *Telegraph Co.* v. *Texas*, 105 U. S. 464, 26 L. Ed. 1067; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *W. U. Tel. Co.* v. *James*, 162 U. S. 654, 16 Sup. Ct. 934, 40 L. Ed. 1106; *W. U. Tel. Co.* v. *Tyler*, 90 Va. 299, 44 Am. St. Rep. 910, 18 S. E. 281; *Reid* v. *W. U. Tel. Co.*, 56 Mo. App. 173; *Ames* v. *Kirby*, 71 N. J. L. 445, 59 Atl. 559; *W. U. Tel. Co.* v. *Hughes*, 104 Va. 246, 51 S. E. 227.

2. Was the message involved here interstate commerce? This also is determined by the authorities, though the cases referred to are without exception cases of transportation by common carriers. Inasmuch, however, as under the express provisions of the act to regulate commerce, telegraph and telephone companies are common carriers, these decided cases are conclusive of the question here involved. Since the case of *Hanley* v. *Kansas City, &c. Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, there has been no dissent from the proposition that although the point of shipment and the point of delivery are within the same

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State, if during the course of transportation the property passes without the boundaries of the State, such a shipment is interstate commerce. *Wichita Falls R. Co.* v. *Asker* (Tex. Cir. App.), 171 S. W. 1114; *Traynham* v. *Charleston, &c. R. Co.*, 92 S. C. 43, 75 S. E. 381; *Sternberger* v. *Railway*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105; *Fraiser & Co.* v. *Railway*, 81 S. C. 162, 62 S. E. 14; *Hunter* v. *Railway*, 81 S. C. 169, 62 S. E. 13; *Crescent Brewing Co.* v. *Oregon Short Line R. Co.*, 24 Idaho 106, 132 Pac. 975; *L. & N. R. Co.* v. *Allen*, 152 Ky. 145, 153 S. W. 198; *State ex rel. Railroad Warehouse Commission* v. *C., St. P., M. & O. R. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238, 12 Am. St. Rep. 730; *Milk Producers Pro. Asso.* v. *D. L. & W. R. Co.*, 7 I. C. C. Rep. 92; *Mires* v. *St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *Hardwick Farmers' Elevator Co.* v. *Chicago, R. I. & P. Ry. Co.*, 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; *St. Louis, &c., R. Co.* v. *State*, 87 Ark. 562, 113 S. W. 203; *Patterson* v. *Mo. Pac. R. Co.*, 77 Kan. 236, 94 Pac. 138, 15 L. R. A., N. S., 733; *United States* v. *Erie R. Co.* (D. C.), 166 Fed. 352.

Upon principle we cannot conceive how any different doctrine can be applied to telegraphic messages between points within the State, which in the course of their transmission pass without the State into any other State or the District of Columbia. We conclude, therefore, that under the authorities the message involved herein was interstate commerce.

3. It has been held in a long line of decisions that even though the message be interstate commerce, under certain conditions, in clear cases of negligence occurring within this State, the penalty of $100 imposed by the Virginia statute may be enforced. All of these cases, however, arose prior to the amendment of the act to regulate commerce of June 18, 1910, providing that telegraph, telephone and cable companies, whether wire or wireless, engaged in interstate commerce, shall be deemed to be common car-

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riers within the meaning and purpose of the act to regulate commerce, shall be required to file their schedules showing their rates, fares, joint classifications and practices with the Interstate Commerce Commission, subjecting them in general terms to all of the rules and regulations applicable to common carriers, and authorizing the Interstate Commerce Commission "to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Section 15).

Since that time, the decisions appear to be uniform in holding that Congress, to use the language of Harrison, J., in the case of *Western Union Telegraph Co.* v. *Bilisoly*, 116 Va. 562, 82 S. E. 91, "has occupied the field of regulation with respect to interstate telegrams," and that "The act of Congress has ousted the State of jurisdiction over the subject." This case, holding that the statute here involved can no longer be invoked in such cases, was followed in *Western Union Tel. Co.* v. *First National Bank of Berryville*, 116 Va. 1009, 83 S. E. 424.

In *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, which was an action of tort from South Carolina, seeking a recovery of damages for mental anguish arising out of the alleged negligent failure of a telegraph company to deliver a telegram in the city of Washington, D. C., sent from South Carolina, the action be-

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ing based upon a statute of South Carolina (S. C. Civ. Code, sec. 2223), authorizing the recovery of damages for mental anguish, the judgment of the Supreme Court of South Carolina was reversed upon the ground that the action could not be maintained without infringing upon the exclusiveness of the control of the Congress of the United States over the District of Columbia; but Mr. Justice Holmes added, in closing his opinion, this language: "But the act (referring to the South Carolina statute) also is objectionable in its aspect of an attempt to regulate commerce among the States."

A case rich in citations is that of *Gardner* v. *Western Union Telegraph Co.*, 231 Fed. 405, 145 C. C. A. 399. This case arose in Oklahoma, and was an action for damages for delay in sending a night letter from Syracuse, Kansas, to Quinland, Oklahoma. The evidence showed that on account of a delay of five days in the delivery of the message, the plaintiff suffered material damage because of the decrease in the market value of broom corn. It was contended by the paintiff that the condition upon the telegraph blank undertaking to relieve the telegraph company from liability "unless the claim should be presented in writing within sixty days after the message is filed with the company for transmission," was void because section 9, Art. 23, of the Constitution of Oklahoma provided that, "Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand or liability, shall be null and void." The plaintiff had failed to present his claim in writing within sixty days. The Supreme Court of Oklahoma, in previous cases, had decided that the section was valid as to telegraph companies. The Circuit Court of Appeals, Eighth Circuit, admitted that it was bound by the construction of the Constitution of the State of Oklahoma as made by the Supreme Court of that State, if applicable to the case then being considered. It

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was contended by counsel for the company, however, that by the act to regulate commerce, as amended June 18, 1910 (36 Stat. 539), the United States had occupied the whole field of transmission of interstate messages by telegraph, and that, therefore, the Constitution of Oklahoma had been suspended so far as the section in question is concerned. The court sustained this contention, and said:

"Pertinent to this contention, sections 1, 2, 6, 12 and 15 of the act to regulate commerce, as amended, are cited. We cannot repeat those sections here, but it appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable, it applies to all interstate telegraph business; that as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commission shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

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The doctrine is also sustained by the following cases: *Dodge* v. *Adams Express Co.*, 54 Pa. Super. Ct. 422; *Ridge* v. *Erie R. Co.*, 54 Pa. Super. Ct. 603; *Strause Iron Co.* v. *Western Union Tel. Co.*, 59 Pa. Super. Ct. 125; *Western Union Tel. Co.* v. *Compton*, 114 Ark. 193, 169 S. W. 946. In the latter case the court first determined that Congress had not fully occupied the field, as to telegraph companies, and hence that the plaintiff could recover for mental anguish under the Arkansas statute; but after the opinion of the Supreme Court of the United States in the case of *Western Union Telegraph Co.* v. *Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, was called to its attention, upon rehearing, the Arkansas court reversed itself. *Western Union Tel. Co.* v. *Johnson*, 115 Ark. 564, 171 S. W. 859; *W. U. Tel. Co.* v. *Simpson*, 117 Ark. 156, 174 S. W. 232; *W. U. Tel. Co.* v. *Holder*, 117 Ark. 210, 174 S. W. 552; *W. U. Tel. Co.* v. *Stewart*, 120 Ark. 631, 179 S. W. 813; *W. U. Tel. Co.* v. *Schoonmaker* (Tex. Cir. App.), 181 S. W. 264.

That common carriers may limit their liability when transporting baggage or property in interstate commerce by regulations contained in their published tariffs filed with and approved by the Interstate Commerce Commission, and that such regulations supersede State statutes and policies and furnish the exclusive rules for determining the carriers' liability, is determined by the Supreme Court of the United States in *Adams Express Co.* v. *Croninger*, 226 U. S. 500, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. N. S. 257; *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 58 L. Ed. 868; *Atchison, &c., R. Co.* v. *Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Cleveland, &c., R. Co.* v. *Dettlebach*, 239 U. S. 593, 36 Sup. Ct. 177, 60 L. Ed. 453; *Georgia, &c., R. Co.* v. *Blish Co.*, 241 U. S. 195, 36 Sup Ct. 541, 60 L. Ed. 948. The telegraph companies so undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, and until disap-

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proved by the Interstate Commerce Commission, these conditions furnish the exclusive rules for determining their liability, subject to the Federal statutes and general law, any State statute to the contrary notwithstanding.

We feel that this unbroken current of authority is controlling and hence the judgment of the court below must be reversed, the verdict set aside and the case remanded for a new trial.

Reversed.

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Richmond.

WESTERN UNION TELEGRAPH CO. v. WILLIAM MAHONE, JR.

January 11, 1917.

1. TELEGRAMS AND TELEPHONES—*Interstate Commerce.*—Where a telegraphic message between two points in the State is transmitted to a point without the State and from there relayed to the point of delivery within the State, this constitutes interstate commerce, although it was possible to have sent the message between the two points without its leaving the State.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of debt. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Hughes, Little & Seawell, Albert T. Benedict and *Francis Raymond Stark,* for the plaintiff in error.

L. B. Way and *E. A. Bilisoly,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The facts in this case are these: William Mahone, at eleven o'clock on the morning of February 6, 1915, delivered to the Western Union Telegraph Company, at its office in the city of Norfolk, Va., a telegram addressed to William Mahone, Jr., at Tye River, Virginia, as follows:

"Stock mentioned in my letter yesterday sold. Need not come."

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Tye River is a station on the Southern Railway between Lynchburg, Va., and Washington, D. C., and according to the testimony the method of transmitting such a message is from Norfolk, Va., through the city of Washington, D. C., and thence by relaying it to Tye River, Va. The message was apparently transmitted from Norfolk to Washington, D. C., promptly, but was not transmitted from Washington to Tye River until about 2:30 P. M. of that day, and the statutory penalty is claimed on account of this delay.

Witnesses for the telegraph company testified that the message was sent to Washington to be relayed to Tye River because that was the only practical and convenient way to transmit it; that there is no direct wire from Norfolk, Va., to Tye River; that in the arrangement of their business there are only three offices in Virginia for the relay of telegraphic dispatches, one in Norfolk, one in Richmond, and one in Lynchburg; that there is no direct wire to Tye River from either Richmond or Norfolk, and there is no direct wire from Norfolk to Lynchburg, but there is a direct wire from Norfolk to Washington, D. C., and a direct wire from Washington, D. C., to Tye River; that sending it through Washington entails only two handlings, and if it had been handled in any other way it would have required more than two handlings, and thus the probability of delay and mistake would have been greater if the message had been handled in any other manner than through the relay office at Washington.

The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives. A local dealer in intoxicating liquors who lived in the State of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri river, which was connected by a bridge with Leavenworth, Kansas, transacted his business thus: After receiving his orders from his Kansas customers, he would make

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deliveries from his warehouse on the Missouri side of the river in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The State of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying: "The Supreme Court of the State gave much weight to the dealer's past conduct, and animating purpose, and relied upon the language quoted from *Austin* v. *Tennessee*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132, and *Cook* v. *Marshall County*, 196 U. S. 261, 49 L. Ed. 471, 25 Sup. Ct. 233. Considered in the light of our former decisions, if the business carried on by the plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the State suffice to change the nature of the transactions." *Kirmeyer* v. *State of Kansas*, 236 U. S. 568, 59 L. Ed. 721, 36 Sup. Ct. 419.

There is no substantial difference between the law applicable to this case and that applicable to the case of *Western Union Telegraph Co.* v. *L. J. Bolling*, 120 Va. 413, 91 S. E. 154, this day decided, and for the reason there stated, the judgment of the lower court in this case will be also reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

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Richmond.

HUNTER'S ADMINISTRATOR v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

January 11, 1917.

Absent, Prentis, J.

Error to a judgment of the Circuit Court of Rockbridge county.

Affirmed by Divided Court.

Curry & Curry and *Timberlake & Nelson*, for the plaintiff in error.

J. M. Perry, for the defendant in error.

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Richmond.

VIRGINIA BLUE RIDGE RAILWAY v. E. L. KIDD, CLERK, ETC.

January 11, 1917.

1. TAXATION—*Deeds of Trust.*—The tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages.

Original application for mandamus.

Awarded.

Caskie & Caskie, for the petitioner.

John Garland Pollard, Attorney-General, and *Leslie C. Garnett, Assistant Attorney-General,* for the respondent.

PER CURIAM.

This day came again the parties, by counsel, and the court having maturely considered the petition of the plaintiff, the answer of the respondent, and arguments of counsel, is of opinion, that the tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages.

It is therefore considered that a peremptory writ of mandamus do forthwith issue directed to E. L. Kidd, clerk of the circuit court of Nelson county, requiring and commanding him to admit to record a certain deed of trust or mort-

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gage from the said petitioner to the American Surety and Trust Company, which said deed secured the payment of four hundred thousand dollars represented by bonds of the Virginia Blue Ridge Railway payable in thirty years from the first day of August, 1916, and bearing interest at the rate of six per centum per annum, upon the payment to him of the tax of four hundred dollars and recording fees; but no costs shall be taxed against the said respondent.

And it is further ordered that the service of a copy of this order upon the said respondent shall have the same force and effect as the service of a peremptory writ of mandamus.

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Richmond.

BOHANNON-KING & CO. v. VELLINES, ADMINISTRATRIX.

March 15, 1917.

1. APPEAL AND ERROR—*Automobiles—Collision.*—Administratrix's decedent was killed, while riding a bicycle, in a collision with an automobile. There was conflict in the testimony as to the speed of the automobile, the precise location of the accident, the conduct of the decedent, and every other material fact in issue. The jury, as judges of the weight of the testimony, had the right to believe that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper lookout; that the machine was going at an excessive rate of speed; that if the driver had been keeping a proper lookout and controlling the machine, he could have avoided the accident, even after the peril of the decedent was discovered; and that, if he had been keeping a proper lookout and had made a proper turn, there would have been no accident. Under these circumstances, and under the mandatory provisions of the statute, requiring the court to consider such cases as upon a demurrer to the evidence, there was no reversible error in the refusal of the court below to set aside the verdict on the ground that it was contrary to the law and the evidence.

Error to a judgment of the Circuit Court of the city of Norfolk, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

W. H. Taylor and *Jas. H. Willcox*, for the plaintiff in error.

Willcox, Cooke & Willcox, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

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The only error alleged in this case is the refusal of the court to set aside the verdict on the ground that it is contrary to the law and the evidence.

Vellines was riding a bicycle on Washington street, in the city of Norfolk, proceeding westwardly. The automobile of Bohannon-King & Co. was proceeding southwardly on Monticello avenue until it reached the intersection of Monticello avenue and Washington street, when it turned eastwardly into Washington street. At a point eastwardly from the intersection of Monticello avenue and Washington street the two collided, and Vellines was so badly injured that he subsequently died.

It is earnestly contended by the plaintiff in error that it was entitled to have the verdict set aside because Vellines was clearly guilty of contributory negligence, and that his administratrix cannot, therefore, recover.

There is the usual conflict of testimony as to the speed of the automobile, the precise location of the accident, the conduct of Vellines, and every other material fact in issue. The question involved, however, was properly submitted to the jury, and the evidence submitted by the plaintiff has some corroboration in the evidence submitted by the defendant. The jury were the judges of the weight of the testimony, and had the right to believe, as apparently they did believe, that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper look out at the time he turned the corner of Monticello avenue into Washington street; that the machine was going at an excessive rate of speed; that he made such a sharp turn at the corner as to pass within four or five feet of the northeast curb; that if he had been keeping a proper look out and controlling the machine, he could have avoided the accident, even after the peril of Vellines was discovered; and that if he had been keeping a proper lookout and had made a proper turn so as to throw the machine on the south

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side of Washington street, the accident would not have occurred.

Under these circumstances, and under the mandatory provisions of the statute, requiring this court to consider such cases as upon a demurrer to the evidence, it is clear to us that there is no reversible error. The judgment will, therefore, be affirmed.

Affirmed.

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Richmond.

BONEWELL V. SMITH.

March 15, 1917.

1. DESCENT AND DISTRIBUTION—*Infants.*—Section 2556, of the Code of 1904, provides that if an infant die without issue, having title to real estate derived from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent, if any be living at the death of the infant, and if there be no such kindred living, then it shall descend and pass to his kindred on the side of the other parent. Under this statute, on failure of issue of an infant last seized, the inheritance descends to the infant's kindred on the side of that parent from whom the real estate was derived, when, as in the case at bar, there are such kindred living at the death of the infant. That is to say, in the quest for the ancestor of the infant who shall constitute the root, or stem, or *propositus*, from whom the inheritance shall descend, we can ascend only to the parent of the infant from whom the real estate was derived, whether such parent may chance to be the first purchaser of the estate or not. The statute does not permit the ascension beyond the parent to the grandparent, or to any other ancestor of the infant, in order to reach the first purchaser as the *propositus* from whom the inheritance shall descend.
2. DESCENT AND DISTRIBUTION—*Kindred.*—The word "kindred," used in the above statute, has the meaning of next of kin.

Appeal from a decree of the Circuit Court of Warwick county. Decree for defendant. Complainants appeal.

Affirmed.

The opinion states the case.

Nelms, Colonna & McMurran, for the appellants.

F. S. Collier, for the appellees.

SIMS, J., delivered the opinion of the court.

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This is a suit for partition of a tract of land to which Virgie Bonewell had title at the time of her death, derived by descent from her father, William T. Bonewell. The latter derived title to this land by descent from his father, William Bonewell (being the only son of the latter), who derived title to it by purchase. Virgie Bonewell was the only child of William T. Bonewell, and died an infant without issue, leaving appellees, defendants in the court below, as her next of kin on the side of her father living at the time of her death. Appellants, plaintiffs in the court below, are the descendants of the whole blood of William Bonewell, and they claim that they are the kindred of the whole blood of Virgie Bonewell on the side of her father, and as such are entitled under the provisions of section 2556 of the Code of Virginia to all of said estate except a small interest to which the defendants would be entitled by reason of intermarriage.

There was a demurrer to the bill and an agreed statement of facts, which are in effect as stated above. The court below, by its decree, sustained the demurrer and dismissed the bill of the plaintiffs. This decree is complained of by the appellants, and the following grounds of error are assigned in their petition for appeal:

"First, because it does not recognize William Bonewell as the first purchaser;

"Second, because it recognizes the defendants as being the *kindred,* and the *only kindred* of Virgie Bonewell, when in fact they are not the kindred (of the blood) that is of common ancestor of Virgie Bonewell;

"Third, because the court has construed the word 'kindred' to mean 'next of kin';

"Fourth, because the court construed the descent from Virgie Bonewell to be to the defendants, when it should have decreed to the plaintiffs."

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It seems that in no case which has been heretofore decided by this court were the descendants of the *first purchaser* claimants as such of the real estate of an infant decedent; so that the precise questions involved in the instant case are now presented for the first time to this court for decision.

The statute, section 2556 of the Code of Virginia, is as follows:

"If an infant die without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from whom it was so derived, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent."

The history of this statute before and including its form as contained in the Code of 1829, and the decisions thereon, are given in 1 Tucker's Commentaries (ed. 1836), pp. 196-7-8. The form of this statute in the Code of 1819 remained unchanged until the Code of 1849, Chap. 123, sec. 9, when it was enacted in the precise form in which it now appears in said section 2556 of the present Code.

The Report of the Revisors of the Code of 1849 (Vol. 2, pp. 636-7) recognizes that this statute is a relic of "the prejudice of the common law in favor of the feudal preference of *the blood of* the first purchaser." The following authorities recognize the same position, namely: *Medley* v. *Medley*, 81 Va. 272; 2 Minor's Inst. (3d ed.), p. 536; Graves' Notes on Real Prop., p. 94; *Davis* v. *Rowe*, 6 Rand. (27 Va.) 393. Such common law rule is set forth in 2 Minor's Inst. (3d ed.) 520-2, 526-9; 2 Minor on Real Prop., secs. 982, 986, 987; Tucker's Com. (1836 ed.) 186-193.

However counsel for appellants do not even contend that such statute re-establishes the common law rule on this subject in its entirety. Hence, we do not feel that any light would be thrown on the case before us by setting forth here

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the common law canons of descent as they originally existed, or as they were modified by the invention of the feud of *indefinite antiquity*, or by English statute law; and especially do we feel that no help would be thus derived in the solution of the question of how far the Virginia statute under consideration re-establishes the common law rule, because that must be determined by the statute itself.

It seems to us plain from the language of the statute that on failure of issue of an infant last seized, the inheritance descends to the infant's kindred on the side of that parent from whom the real estate was dreived when, as in the case at bar, there are such kindred living at the death of the infant. That is to say, in such cases, by reason of the express provision of the statute in the quest for the ancestor of the infant who shall constitute the root, or stem, or *propositus*, from whom the inheritance shall descend, we can ascend only to the parent of the infant from whom the real estate was derived. Such parent, it is true, may chance to be the first purchaser of the estate, or he may not be such purchaser. In the latter case, however, he would be of the blood of the first purchaser. To that extent the statute in question recognizes "the feudal preference of the blood of the first purchaser," but no further. The statute does not permit us to ascend beyond the parent to the grandparent, or to any other ancestor of the infant, in order to reach the first purchaser as the *propositus* from whom the inheritance shall descend. The parent only, and in no case any more remote ancestor, is made by the statute such *propositus*. Therefore, whether the parent be, or be not, the first purchaser, is not made a test by the statute for the ascertainment of the person who shall constitute the *propositus*, from whom the inheritance shall descend. He is by the statute designated to be such person, without further qualification, than that he must be *the parent* of the infant from whom the title to the real estate "was derived by gift, devise or descent." This, we think, is the proper construction of this statute.

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It follows that there is no merit in the first assignment of error.

From the conclusion that the parent, William T. Bonewell, is the root, or stem, or *propositus*, from whom the inheritance in question descended, and not William Bonewell, the grandparent, it also follows that the remaining assignments of error are not well taken, giving to them the meaning they are intended to have. It is not contended by counsel for appellants, as we understand it, that if William T. Bonewell, the parent, is the *propositus* mentioned, the next of kin of the infant, Virgie Bonewell, on the side of that parent are not the persons designated by the statute as the heirs of the infant. If the contention had been otherwise, there can be no doubt that such is the proper construction of this statute.

As stated by Mr. Minor (2 Min. Inst. [3d. ed.], pp. 538-9), it was held by this court in the early case of *Davis* v. *Rowe*, 6 Rand. (27 Va.) 393, that our statute of descents as first enacted, "was founded on the affections of the heart, and follows the current of its natural flow, preferring as heirs the classes nearest in blood." The same consideration, in our opinion, applies to that portion of the statute of descents embodied in section 2556. The word "kindred" therefore, used in such statute, has the meaning of "next of kin."

The case of *Johnson* v. *Phillips*, 85 Ark. 86, 107 S. W. 170, is cited and strongly relied on in behalf of appellants. The latter case was controlled by the Arkansas statute, which is materially different from our Virginia statute. The Arkansas statute applies to adults as well as infants, and forbids the inheritance going to kindred not of the blood of the devisor or ancestor. It had been construed in the prior case of *Kelly's Heirs* v. *McGuire*, 15 Ark. 555, to have the meaning and intention to prohibit the half blood, and their descendants alike, from sharing in the inheritance of an estate which might come to the intestate by descent, de-

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vise or gift from *any ancestor*. In the case of *Johnson* v. *Phillips, supra*, J. A. Phillips died seized and possessed of the land in controversy, leaving surviving him his widow, a brother and a sister, the heirs of another sister, and three children. His widow married one Houston and of that marriage there were two children. Houston died and the widow married one Edwards and died while the suit was pending. Two of the Phillips children died in infancy: Elizabeth Phillips alone survived. She married one Nelson, and one child, Elizabeth Nelson, was born of that union. Both the mother and father of the latter died leaving such child surviving, and subsequently the child died without issue. The suit was brought by the brother and sister and the heirs of the other sister of Phillips against Mrs. Edwards and the Houston children to establish and quiet their title. It was held that the case was ruled by said prior Arkansas case of *Kelly's Heirs* v. *McGuire*, and in effect that the inheritance could not descend to the next of kin of the infant, Elizabeth Nelson, because they were of the half blood of Mrs. Nelson, which was forbidden by the statute to inherit. But for such statute such next of kin would have inherited. There is, therefore, no conflict in such decision with our construction of the Virginia statute.

The same is true of the New Jersey statute on the subject, which is similar to the Arkansas statute, and the construction of that statute referred to in the case of *Cox* v. *Clark*, 93 Ala. 400, 9 So. 458, cited and relied on by counsel for appellants.

In view of what is said above, we do not feel that any detailed reference is necessary to other authorities cited by counsel for appellants bearing upon the construction of the word "kindred" when found in contexts other than the Virginia statute in question.

For the reasons stated, we find no error in the decree complained of, and it will be affirmed.

Affirmed.

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Richmond.

CLAY'S ADMINISTRATOR v. KELLY.

March 15, 1917.

1. PARTNERSHIP — *Equity Jurisdiction—Accounting—Disclosure.*—A partnership was formed to obtain and carry out a government contract. After the contract was obtained one of the partners, K., wished to withdraw and did so, receiving a consideration of five hundred dollars ($500) from the other partners. After his withdrawal he had no connection with the firm, except as one of the guarantors on the bond to the government. The partnership, unable to carry on the government work itself, desired to assign its contracts to another firm, M. & J., upon terms which promised a substantial profit to the partnership. But the firm, M. & J., upon assuming the contract, demanded the signature of the retiring partner, K., to the contract of assignment. This he refused to give without compensation, and under protest the partnership agreed to pay him one-tenth of the profits which it might realize from the contract with M. & J. The second firm, M. & J., finding itself unable to carry on the government contract, entered into an agreement with the partnership, by which their contract with it was canceled, and surrendered to the partnership the construction outfit on the site of the government works. The partnership then entered into a contract with a third firm, whereby the third firm took over the construction plant and the work to be done under the government contract, agreeing as a consideration for the transfer to pay the debts of the second firm, M. & J., which had been assumed by the partnership, and also to pay the partnership the sum of $65,000. To these two last transactions the retiring partner, K., was not a party. The retiring partner instituted a suit in equity against the partnership for a disclosure and an accounting. The defendants demurred to the bill on the ground that its allegations did not sufficiently charge a new partnership, which they alleged was essential to the standing of the complainant in a court of equity.

Held: That complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which

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underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleged profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction.

2. PARTNERSHIP—*Construction of Contract of Partnership.*—The retiring partner, K's contract, when he re-entered the firm, provided that he should receive "one-tenth of the profits that may be realized by said firm in the matter of the contract with M. & J." His bill distinctly set out the subsequent contracts and transactions and claimed a share in the profits derived therefrom by the appellants upon the theory that these profits were realized by them in consequence of the M. & J. contract, though not directly thereunder. Defendants excepted to certain testimoney disclosing the transactions whereby they, after the surrender of the plant by M. & J. arranged with a third firm to complete the work; insisting that the testimony was improper because the bill stated a case under which the complainant could only recover by showing that profits were realized directly from the M. & J. contract.

Held: That under the bill such testimony was properly admissible.

3. PARTNERSHIP — *Bill for Accounting — Objection to Evidence.*— Shortly after the final assignment of the government contract, and in pursuance of the contract with the assignees, a receiver was procured for the partnership, and thereby certain technical difficulties were obviated, and the transfer of the government contract was perfected.

Held: That although the complainant was not a party to that suit, the record might be introduced by him to show the facts appearing therein as to the transfer of the contract, the disposition of the assets of the firm, and the payment therefor. The matters shown in that record were not within the rule of evidence as to *res inter alios acta.* They were independent material facts, proved by the record, charged in the complainant's bill, and proper as evidence to support his case.

4. DURESS—*Partnership.*—K., upon retiring from the partnership, as set out above, was under no obligation of duty, contractual or otherwise, to the defendants. Being under no obligation to sign the contract of assignment, and preferring not to do do so at all, even for a consideration, there was no foundation upon which to rest any claim of duress in the procurement of the new agreement by which he was to receive a share of the profits.

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5. CONTRACTS—*Consideration.*—K., the retiring partner, had been of service to his partners in securing the government contract and giving the necessary bond. He remained bound under both so far as the government and the surety company were concerned. These facts constituted abundant consideration for the $500 which the partnership paid him upon a final settlement and termination of their relations with him as an associate under the original contract.
6. CONTRACTS—*Consideration.*—The contract of the partnership to pay K. a share of the profits upon his signing the contract with M. & J., rested upon sufficient consideration. His signature resulted in both a benefit to the appellants and a risk to himself.
7. CONTRACTS—*Consideration.*—A valuable consideration is a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it, to the party promised.
8. PARTNERSHIP—*Profits.*—K., the retiring partner's new contract with the partnership upon his signing the contract with the firm of M. & J., provided that he was to receive "one-tenth of the profits that may be realized by said firm in the matter of the contract" entered into by said firm with M. & J. The defendants contended that the profits realized were not in the matter of the contract with M. & J., but were derived from the contract with the final assignee.

   Held: That the profits must be regarded as profits realized by the firm in the matter of the contract with M. & J.

Appeal from a decree of the Chancery Court of the city of Richmond. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Leake & Buford, A. W. Patterson, and *Cutchins & Cutchins,* for the appellant.

A. L. Holladay and *Kelley & Coulbourn,* for the appellee.

KELLY, J., delivered the opinion of the court.

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This suit in equity, for a disclosure and accounting, was instituted by Michael Kelly against S. P. Cowardin, James F. Bradley, Thos. E. Stagg and S. P. Clay, his former partners in a certain construction contract. Pending the suit S. P. Clay died, and the cause was revived against his administrator. This is an appeal from a decree settling the principles of the cause in favor of the complainant and directing an account.

The transactions leading up to this litigation are simple enough in themselves, but any intelligent narration of them must necessarily be somewhat prolix.

On March 24, 1903, all of the parties named above, Cowardin, Bradley, Clay, Stagg and Kelly, entered into a partnership agreement, under the firm name of Cowardin, Bradley, Clay & Co., for the purpose of bidding on a contract with the United States government for the erection of a water filtration plant in Washington city. Cowardin, Bradley and Clay were to be the active managers. Stagg and Kelly were to furnish $10,000 each, as the first capital of the firm, if the contract was awarded to it, and when the $20,000 thus provided was exhausted, all the partners were to be equally obligated to assist in raising any needed funds. Except as here indicated, and as to the further obligation to assist the others in securing bonds needed for the bid and contract, Stagg and Kelly were not required to render any other services, but were to have an equal voice in the management of the affairs of the firm.

Their bid, of $989,000, was accepted. A preliminary bond of $150,000 was executed by all the members of the firm, and this was superseded in a few days by a final bond for $200,000, likewise executed by each member, and also by a bonding company as surety; and, on April 6, 1903, the contract between the government and Cowardin, Bradley, Clay & Co. was duly executed.

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About this time Kelly became anxious to sever his connection with the contract. It is not entirely clear from the evidence that his written request for release stated all his reasons, but the material fact in this connection is that on April 4, 1903, he wrote a letter to the firm in which he said: "I have been very much disappointed in financial matters and besides my health is failing very much; I find it impossible to raise the necessary funds to comply with my promises and wishes. I therefore ask most respectfully to be relieved of any and all obligations that I have entered into, and wishing you great success," etc.

On April 7, 1903, just one day after the contract was closed with the government, Thos. E. Stagg, acting for himself and for Cowardin, Bradley and Clay, paid Kelly $500 in cash and Kelly signed a paper presented to him by Stagg, reciting the original partnership agreement, the contract between the partnership and the government, and containing also the following recital and agreement:

"Whereas, now the said M. Kelly expresses his inability to comply with one material condition of said copartnership, and desires to be released from the terms and obligations to provide the sum of Ten Thousand Dollars, as aforesaid, but having by his aid and credit, jointly with each of said parties secured the necessary bond required by the United States government, and is bound for the completion of said contract;

"Now, therefore, this agreement witnesseth, that for and in consideration of the premises, as well as the sum of five hundred dollars, paid to the said M. Kelly, and in further consideration that the said M. Kelly shall be relieved of any duties and all further liability incurred by reason of the prosecution and completion of the aforesaid contract with the United States government, the said M. Kelly doth acknowledge his liability to the Fidelity and Deposit Company of Baltimore as the guarantor on said bond, and doth

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agree that he is not further interested in any way in the said contract with the United States government, and that he will not assert or make any claim for any profits arising thereunder."

This transaction was the end of Kelly's dealings with his former partners and of his knowledge of what they were doing under the contract, until he was requested to meet them in Washington on May 26, 1903.

Meanwhile, Cowardin, Bradley, Clay and Stagg, continuing in the enterprise under the firm name of Cowardin, Bradley, Clay & Co., began work under the contract with the government, and got together a small equipment, but were financially unable to make very substantial progress, and soon concluded that their only chance to realize any profit for themselves or to perform the obligations they had assumed, was to transfer their contract to some other person or firm having the ability to carry it out. After some negotiations with other persons had failed to materialize, the contracting firm of May and Jekyll made a proposition which resulted in a contract, prepared by the attorney for May & Jekyll, by which they obligated themselves to take over and complete the work on terms which promised a substantial profit to Cowardin, Bradley, Clay & Co. This contract as prepared, and as finally executed, designated Kelly as one of the partners in the last named firm, required his signature, and upon its face made him in all respects a party thereto, bound by all its obligations and entitled to all its benefits, exactly as the other partners were. When it was explained to the attorney for May & Jekyll that Kelly was no longer interested in the contract, he insisted that Kelly's signature was essential in order to insure the approval of government representatives who would have to pass upon the contract. Thereupon, on May 26, 1903, Cowardin and others sent an urgent message to Kelly in Richmond, requesting him to come to Washington at once, and he did so.

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Upon his arrival in Washington, the situation was explained to him and he was requested to sign the contract. This he declined to do without some promise of compensation. The evidence is conflicting upon some points as to what followed, but it is clear that Kelly much preferred not to sign the contract, even for a consideration, and that without some consideration he would not have signed it at all. His attitude led to considerable acrimony among the parties. Cowardin and others sought the advice of their own counsel, and were advised to agree under protest to Kelly's terms. Thereupon, Cowardin, Bradley, Clay and Stagg signed and delivered to him a paper in these words: "We and each of us, co-partners under the firm name of Cowardin, Bradley, Clay & Co., hereby agree with Michael Kelly to pay him one-tenth of the profits that may be realized by said firm in the matter of the contract this day entered into by said firm with May & Jekyll of New York City." Kelly disclaims any recollection of a protest, but the weight of the evidence shows that the other parties first offered him a written agreement to pay the ten per cent, embodying in the writing a protest; that he indignantly refused to accept this; that they then offered him the paper above quoted which he accepted, and accordingly signed the May & Jekyll contract; that then Cowardin, speaking for himself and others, reminded all the parties present that he had protested against agreeing to pay the ten per cent "and intended never to make the payment."

On August 25, 1903, May & Jekyll, who were then apparently in a failing condition financially, entered into a written contract with Cowardin, Bradley, Clay and Stagg, under the terms of which the contract of May 26, 1903, was cancelled and the former firm surrendered to the latter the construction outfit on the site of the filtration plant, and all the rights and contracts connected therewith. And, on the same day, Cowardin, Bradley, Clay and Stagg entered

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into a contract with the firm of Dean & Sibley (acting for the Sand Filtration Company of America then about to be incorporated and organized) whereby Dean & Sibley took over the construction plant and the work to be done under the government contract, agreeing as a consideration for the transfer to pay the debts of May & Jekyll amounting to $34,176.10 which had been assumed by Cowardin, Bradley, Clay and Stagg, and also to pay the latter firm the sum of $65,000. This last named contract was, manifestly from the record, entered into with the knowledge, consent and co-operation of May & Jekyll, and the two contracts of August 25th were essentially concatenated and interdependent. Kelly was not a party to either of them, but in each Cowardin and his associates agreed to hold the other parties harmless against any loss resulting from that fact.

Shortly thereafter, pursuant to one of the stipulations in the Dean & Sibley contract, a receiver was procured for Cowardin, Bradley, Clay & Co. in a suit instituted in the Supreme Court of the District of Columbia, and thereby certain technical difficulties, not necessary to notice further, were obviated, and the transfer of the government contract to Dean & Sibley was perfected.

The first assignment of error is that the court improperly overruled the demurrer to the bill. The ground of demurrer chiefly relied upon is that the allegation "touching the formation of a new partnership between Kelly and the defendants on May 26, 1903, is obscure," and does not sufficiently charge any such new partnership; and the argument advanced is that the existence of a partnership relation between the parties is essential to the standing of the complainant in a court of equity.

The bill alleges the original partnership, the retirement of Kelly therefrom, and his subsequent coming back into the firm, for a purpose and upon a consideration therein specifically set out. The contract with May & Jekyll, filed

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with the bill, shows upon its face that he executed it as a member of the firm, and the collateral contract, also filed with the bill, defines the interest which he was to have in the profits realized "in the matter of" the former contract. The bill further alleges that Cowardin, Bradley, Clay and Stagg realized $65,000 in profits arising out of that matter, in addition to certain percentages retained by them on payments by the government while May & Jekyll were in charge of the plant, and other profits, the sources and amounts of which complainant does not know; and the prayer of the bill is for a disclosure and accounting. Complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleged profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction. Merwin's Eq., sec. 581, 584; Lile's Notes to same, p. 116; *Wilson* v. *Miller,* 104 Va. 446, 448, 51 S. E. 837. The demurrer was properly overruled.

There was also a motion made, after the evidence was all in, to dismiss the bill upon the ground that the proof failed to show a case for jurisdiction in equity, even if the allegations of the bill were sufficient for that purpose. The court overruled the motion, and its action in doing so is made the basis of the second assignment of error. In our view of the case, the evidence was entirely sufficient to establish the relationship and the character of the controversy upon which the complainant invoked the equity jurisdiction in his bill, and upon which we have sustained his resort to that forum. There was no error in overruling the motion.

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The next ground upon which we are asked to reverse the decree is that the court overruled certain exceptions to testimony and evidence introduced by the complainant.

It appears that the cause was argued and submitted some time before the decree appealed from was entered, the court in the meantime having it under advisement; that on November 15, 1915, the decision was announced in a written opinion; and that on December 8, 1916, the decree was entered, containing the following pertinent recital: "And this day at the entry of the decree carrying into effect the opinion of the court, the defendants, by counsel, moved the court to pass on the exceptions of the defendants shown in the depositions to have been taken to certain of the evidence of the plaintiff, especially their exception to the admissibility of said transcript of the record from Washington, and the court declined to pass on any of said exceptions because they were not pointed out and urged in the argument of the counsel at the time the cause was argued and submitted."

Independent of any question as to the waiver of these exceptions, the appellants have not been prejudiced concerning them. The exceptions relate to certain testimony disclosing the transactions whereby the appellants, after the surrender of the plant by May & Jekyll, arranged with other parties to complete the work; and it is insisted that the testimony was improper because the bill stated a case under which the complainant could only recover by showing that profits were realized directly from the May & Jekyll contract. We do not so understand the bill or the complainant's rights. The bill distinctly sets out the subsequent contracts and transactions, and claims a share in the profits derived therefrom by the appellants upon the theory that these profits were realized by them in consequence of the May & Jekyll contract, though not directly thereunder. This theory was justified by the terms of the contract which promised Kelly "one-tenth of the profits that may be real-

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ized by said firm in the matter of the contract with May & Jekyll," and the evidence was proper as tending to sustain that theory. And, with reference to the record of the receivership suit in the Supreme Court of the District of Columbia, which was introduced by the complainant, and to which this assignment of error is likewise directed, the same may be said. It is true, as pointed out by appellants, that Kelly was not a party to that suit, but the record was introduced by him, not against him, and was proper to show the facts appearing therein as to the transfer of the contract, the disposition of the assets of the firm, and the payment therefor, in all of which the appellants were parties and active participants. The matters shown in that record were not, as counsel for appellants contend, within the rule of evidence as to *res inter alios acta.* They were independent material facts, proved by the record, charged in the complainant's bill, and proper as evidence to support his case. See Broom's Legal Maxims (8th ed.), 958, *et seq.*

We come now to the assignment of error upon which we understand appellants to place their chief reliance, and naturally so because, if sound, it would furnish a basis for reversal, going to the merits and substance of the controversy rather than to the form in which the controversy is presented. This assignment challenges the validity of the contract for one-tenth of the profits on the grounds, (1) that it was obtained through duress, and (2) that it was without consideration.

To maintain the contention that the contract was obtained by duress, the appellants rely upon the testimony of Mr. Darlington, a distinguished member of the bar of the Supreme Court of the District of Columbia, who stated, as an expert and in answer to an hypothetical question, that in his opinion "the contract would not form a basis of recovery in the District of Columbia." The facts assumed in the hypothetical question brought the execution of the contract,

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in his opinion, within the doctrine of duress as announced "in the case of *Swift Co.* v. *United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, and particularly within the English case of *Parker* v. *Great Western Ry. Co.*, 7 M. & Gr. 253, cited and approved by the court in that case." Mr. Darlington's testimony is claimed by appellants to be conclusive, since the contract was made and was to be performed in the District of Columbia, and no evidence was offered in conflict with his statement of the law. It is perfectly apparent, however, that the hypothetical question assumed, or at least that he certainly understood it to assume, that there was some legal obligation on Kelly's part to sign the contract. This is the crucial point, both as to the alleged duress and the alleged want of consideration. The law, as testified to by Mr. Darlington, does not seem to be different in the District of Columbia from the law elsewhere generally upon the subject of duress, as involved in this case. The doctrine as stated by Judge Harrison in *Harris* v. *Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913 A, 1350, and as quoted and relied upon by appellants, is as follows:

"The doctrine appears to be well established that where one party has possession or control of the property of another and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion and duress. Nor can it be doubted that a contract, procured by threats inducing fear of the destruction of one's property, may be avoided on the ground of duress, there being nothing in such a case but the form of a contract, wholly lacking the voluntary assent of the party to be bound by it. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils; as, inconvenience and loss by the detention of property, loss of prop-

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erty altogether, or compliance with an unconscionable demand."

This doctrine, however, does not apply here, because the element of an unlawful demand is lacking. The contract of April 7, 1903, whereby Kelly was released from any further obligation so far as Cowardin, Bradley, Clay and Stagg were concerned, is not correctly interpreted in the hypothetical question answered by Mr. Darlington. The dominant purpose of that contract, to which he was not required to attach his signature, was not to sell Kelly's interest, but to release him from the contract and from all its burdens and obligations. He had, however, already been of service to his partners in securing the contract and giving the necessary bond, and he remained bound under both so far as the government and the surety company were concerned. This latter fact prominently appears in the release contract, and it was an abundant consideration for the $500 which they paid him upon a final settlement and termination of their relations with him as an associate under the original contract. The opinion of the learned judge of the lower court deals somewhat elaborately with this phase of the case, and we quite agree with his conclusion that, "on May 26, 1903, Kelly was under no obligation of duty, contractual or otherwise, to the defendants." And this is necessarily the end of the contention that Kelly procured the contract for a share in the profits by duress. Being under no obligation to sing the May & Jekyll contract, and preferring not to do so at all, even for a consideration, there is no foundation upon which to rest any claim of duress in the procurement of the agreement which he now seeks to enforce.

What has been said to show that there was no duress upon the part of Kelly, practically disposes of the further contention that there was no consideration for the contract for a share in the profits. With no obligation upon him to

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do so, he signed, at the instance of appellants, and with little opportunity for deliberation, an involved and complicated contract with May & Jekyll which appellants' counsel insist placed him under no further obligations and subjected him to no further risks than already rested upon him by virtue of the government contract and bond, and which, on the other hand, counsel for appellee insist enhanced and added very materially to those risks and obligations. The judge of the lower court took the latter view, and demonstrated the correctness of it in a partial analysis of the contract which, as he said, might have been still further elaborated in vindication of his conclusion. The numerous transactions and contracts involved render it impossible, in an opinion of reasonable length, to discuss them all in any great detail, and it must suffice here to say that no one, without obligation to do so and without consideration for doing so, could have been expected to become a partner with Cowardin and others in the May & Jekyll contract, and that there were risks and obligations incurred thereunder which were different from and in addition to those imposed by the original contract with the government. It is beside the mark to argue that Cowardin and others were about to fail, that their failure would have resulted in loss to Kelly under the government contract and bond by which he was still bound, and that if the deal with May & Jekyll succeeded it would enure to Kelly's benefit. If he had never been released from the original contract, he could not have been compelled to sign a second one. It was his privilege to choose between the risk of this first loss that seemed to face him and a second one which could very possibly have been greater than the first. His signature resulted in both a benefit to the appellants and a risk to himself. "A valuable consideration is a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or

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injury, or the risk of it, to the party promised." 4 Min. Inst., pt. 1, p. 22.

This disposes of the substance of all the assignments of error, except one which charges that the court erred in finding that the defendants had realized profits from the contract of May 26, 1903. That contract was an indirect transfer of the government contract, and contained a stipulation that if May & Jekyll failed to carry out their contract, they should surrender the plant, upon specified terms, to "the parties of the first part" to complete the work. Kelly was one of the parties of the first part. He was not consulted when May & Jekyll failed, and the plant was surrendered to Cowardin and others under terms which, by mutual agreement, were different from those originally specified for the surrender. The government contract was then completed, under the circumstances already briefly outlined, and appellants realized a profit of $65,000. We have no difficulty in holding that this sum, as well as any net amounts they may have realized while May & Jekyll were doing the work, must be regarded as profits "realized by the said firm in the matter of the contract" with May & Jekyll. Appellants insist that this sum was profit from the government contract, and not from the May & Jekyll contract which failed of completion. The argument proves too much. A primary contention of the appellants is that it was the duty of Kelly to sign the May & Jekyll contract since that contract provided a means of rescuing the parties from financial ruin; and, as a matter of fact, it was a very important factor in the final completion of the government contract. We have seen that Kelly was under no duty to sign the agreement, but it can hardly be consistently argued that profits which his signature to the May & Jekyll contract made possible were not in the contemplation of the parties as profits "realized from the matter of" that contract. The lower court disposed of this question as follows:

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"As to whether there were any profits: The defendants did make gains or profits to the amount of a large sum; that these gains were profits arisng from the contract has been decided by the Court of Appeals, District of Columbia, and by the Supreme Court of the United States, where the May 26, 1903, contract was up for consideration, see the case of *Sand Filtration Corporation* v. *Cowardin*, 29 App. D. C. 571, and the same case 213 U. S. 560, 29 Sup. Ct. 509, 53 L. Ed. 833."

It is quite true that Kelly was not a party to the litigation between Cowardin & Co. and the Sand Filtration Corporation in the Federal courts, and that the issues there were different from those in the instant case; but it is apparent from the opinion of the Court of Appeals of the District of Columbia and of the Supreme Court of the United States, cited above, that both courts regarded the profits realized by Cowardin & Co. as having been an outgrowth of the May & Jekyll contract. Nor do we see how they could be otherwise regarded. The chief consideration for the $65,000 paid by the Sand Filtration Corporation was the plant and equipment acquired from May & Jekyll; and it was by virtue of the contract with them that the appellants finally secured the performance of the contract with the government.

The decree of the chancery court, in our opinion, was right in all respects, and must be affirmed.

Affirmed.

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Richmond.

COLLIER V. HIDEN.

March 15, 1917.

1. BOUNDARIES—*Petition to Determine—Parties.*—Acts of Assembly of 1912, p. 133, provide, "that any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said court, the true boundary line or lines to such real estate as to one or more of the coterminous landowners. All persons interested in the coterminous real estate shall be made parties to the said petition which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition." Under this statute where the petitioner has only a life estate, he must either have the remaindermen unite with him as plaintiffs, or have them made defendants.
2. JURY—*Waiver—Boundaries.*—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant.

Appeal from a decree of the Circuit Court of Greene county. Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

John S. Chapman, for the appellant.

E. M. Averill, for the appellee.

SIMS, J., delivered the opinion of the court.

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This case involves a proceeding by petition to have ascertained and designated by the court the true boundary lines of real estate under Acts of Assembly 1912, p. 133.

The appellee was plaintiff and the appellant defendant in the court below, hereinafter referred to as plaintiff and defendant.

The proceeding was erroneously had on the chancery side, instead of the law side, of the court, as the statute provides, but in the view we take of the case it is not necessary to consider the effect of that upon the validity of the process or otherwise.

There was no appearance by the defendant until after final order or decree in the case.

The plaintiff was the owner of a life estate only in his real estate, his wife and children being entitled thereto in remainder in fee. The latter were not made parties to the proceeding.

Trial by jury was not waived "by consent of parties" and the court below disposed of the case without a trial by jury.

There are five assignments of error in the petition before us, praying that a new trial be awarded, only two of which need be considered, which are in effect as follows:

First. That the statute aforesaid requires that all persons interested in the coterminous real estate shall be made parties to the petition; and that, therefore, the wife and children of the plaintiff were necessary parties to the proceding, being the owners in remainder in fee of the land in which the plaintiff owned a life estate only. It is not denied that the plaintiff, as life tenant, could alone file his petition; but it is alleged that under the statute he should have either had the remaindermen unite with him as plaintiffs or have made them defendants.

Second. That the said statute provides that, "The trial by jury may be waived by consent of parties;" that without such consent the questions involved must be tried by a jury;

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that the record shows no consent of parties to waive a trial by jury; and hence the final order or decree in the case was void for lack of jurisdiction in the court to enter it.

We will consider these assignments of error in their order as stated above.

The statute in question is as follows:

"1. Be it enacted by the General Assembly of Virginia, That any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said court, the true boundary line or lines to such real estate as to one or more of the coterminous landowners. All persons interested in the coterminous real estate shall be made parties to the said petition which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition.

"The trial shall be conducted as other trials at law and the same rules of evidence shall apply and the same defenses may be made as in other actions at law; the trial by jury may be waived by consent of parties, the judgment of the court shall be recorded in the common law order book and in the current deed book of the court, and indexed in the name of the parties to the petition. The court may, upon application of either party to the petition, by order in term time or in vacation, direct such survey or surveys to be made as may be deemed necessary. The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns. The judgment of the court shall be subject to review by the Supreme Court of Appeals of the State upon writ of error."

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First. With respect to the first assignment of error above mentioned.

We are of opinion that this assignment is well taken. The statute, it is true, allows "any person having an interest in real estate" to file the petition provided for thereby; but it further, in express terms, provides that, "All persons interested in the coterminous real estate shall be made parties to the said petition * * *" The statute is not free from ambiguity with respect to the meaning with which it uses the word "coterminous" in the sentence here quoted, in view of its use of the same word in its designation of "coterminous landowners" in the preceding sentence. The "landowners" referred to in the former sentence are clearly meant by the statute to be the owners of the land on the opposite side of the boundary line from the plaintiff, to-wit, the defendants in the proceeding. When the statute, however, in the following sentence, does not designate those who shall be made parties to the petition as all "coterminous landowners," but "all persons interested in the coterminous *real estate*," the language would seem to have a broader meaning, and to include the owners of the land on both sides of the boundary line in controversy, to-wit, both plaintiffs and defendants; and in view of the policy of the law and of this statute to lessen litigation, we think this meaning must be given to it.

We are, therefore, of opinion that the said parties entitled in fee in remainder to the land in which the plaintiff owned only a life estate, were necessary parties to the proceeding and should have been made parties plaintiff or defendant to the petition.

Second. With respect to the second assignment of error above mentioned.

It is true that the statute under consideration provides that the petition "shall be matured for hearing as provided for maturing an action of ejectment, except that it shall

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not be necessary to serve a copy of the petition," and that "The trial shall be conducted as other trials at law * * *" If the statute had stopped there with respect to its provisions touching the procedure under it, no express consent of both plaintiff and defendant to waiver of the trial by jury would be necessary; for in other trials at law, by virtue of section 3166 of the Code of Virginia (Pollard's Code, 1914) a trial by jury is waived if neither plaintiff nor defendant demand such trial. But the statute we have under consideration does not stop there, but goes on, and uses different language from said section 3166 with respect to the manner in which the trial by jury may be waived, namely: it provides that "the trial by jury may be waived *by consent of parties.*" (Italics supplied.) We must interpret the language of the legislature as we find it and give some meaning to this further provision of the statute. In doing so we cannot escape the conclusion that the statute requires a trial by jury in every case arising under it unless such trial is waived by the consent of parties both plaintiff and defendant.

We are, therefore, of opinion that this assignment of error is also well taken.

For the foregoing reasons, the order or decree complained of must be set aside and annulled and a new trial granted.

Reversed.

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Richmond.

CONRAD v. ELLISON-HARVEY CO.

March 15, 1917.

1. MASTER AND SERVANT—*Discharge—Question of Law or Fact.*—In an action of assumpsit by a servant against his master to recover on account of his salary for the balance of the year upon a wrongful discharge, where the evidence tended to show that the master had secretly determined to drop the servant, and in effect had done so, the question whether he was discharged or quit of his own accord, is one for the jury to answer.
2. APPEAL AND ERROR—*Point not Raised in Lower Court.*—It was urged by the defendant, that as the action was based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contained only the common counts in assumpsit; and, that, therefore, his action must fail.

   Held: That as this point was not made in the lower court, it could not be successfully raised for the first time in the appellate court.
3. MASTER AND SERVANT—*Evidence.*—In an action by an employee against his employer for wrongful discharge, the original contract of hiring made several years before was admissible for the purpose of showing the terms of the original hiring.
4. APPEAL AND ERROR—*Exceptions and Objections.*—Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out.
5. DECLARATION—*Amendment.*—It was urged by the defendant, that as the action was based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contained only the common counts in assumpsit. Conceding that the declaration was defective, it was the duty of the defendant, if it intended to rely upon that point, to then and there call the court's attention to it. Section 3384 of the Code of 1904, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would

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have been presented in the trial court if the question first raised on appeal had been raised there. This statute has always, and most properly, been regarded with favor, and construed with liberality by the courts of this State; and its terms would have fully met the condition complained of by defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant can not upon appeal take advantage of the irregularity which the statute would have cured.

6. MASTER AND SERVANT—*Assumpsit.*—Upon a wrongful discharge of a servant his appropriate remedy is assumpsit.

7. MASTER AND SERVANT—*Term of Employment.*—Plaintiff was originally hired for a fixed term of one year. He held over for several succeeding years without any new agreement. The only change ever made was one increase of salary.

Held: That the question of whether he was employed at the time of his discharge by the month or by the year was for the jury.

8. MASTER AND SERVANT—*Term of Employment—Construction of Contract of Employment.*—The plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in determining the probable intention of the parties in continuing the relationship after the first year had expired. After the end of each year, the employment continued, some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made.

9. MASTER AND SERVANT—*Duration of Term of Employment.*—The English rule is that every general hiring is presumed to be for one year, in the absence of stipulations or circumstances to rebut the presumption. In the United States the prevailing doctrine is that every such general hiring is terminable at the will of the parties. Both in England and in this country, however, when one enters the employment of another for a definite period (of one year or less) and continues in that employment after the expiration of that period without any new agreement, the presumption, rebuttable of course by evidence, is that he is again employed for a like term.

10. MASTER AND SERVANT—*Contract of Employment—Statute of Frauds.*—A servant was employed under a written contract for one year, beginning on January 1st, and afterwards continued in his employment from year to year without any other contract in writing, until his discharge on June 30, 1914.

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Held: That his contract for 1914 was based upon implication and presumption drawn in part from previous dealings between the parties, but it was nevertheless a new contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for one year's service, to begin and be performed within the year, and consequently not within the statute of frauds.

Error from a judgment of the Law and Equity Court of the city of Richmond, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

J. C. Page, for the plaintiff in error.

Jo Lane & Cary Ellis Stern, for the defendant in error.

KELLY, J., delivered the opinion of the court.

L. A. Conrad, claiming to have been employed as a bookkeeper by the Ellison-Harvey Company, a corporation, for a period of one year from January 1, 1914, and to have been unlawfully discharged on June 30, 1914, brought this action of assumpsit to recover on account of his salary for the balance of the year. There was a verdict and judgment against him, and thereupon he obtained this writ of error.

Conrad's original employment with the Ellison-Harvey Company began on January 1, 1910, under a written contract which fixed his compensation at $100 per month and his term of service at one year. When the year expired, he continued in the same employment without anything being said as to a new arrangement. In May, 1911, the company, upon a recommendation made by Mr. Harvey at a meeting of the directors, increased Conrad's salary to $125 per month. So far as the record discloses, this increase was

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not intended to have, or regarded as having, any effect upon the term of his employment. He remained in the service of the company throughout the years 1911, 1912, 1913 and until June 30, 1914, when, as he alleges, he was discharged.

The assignments of error relate exclusively to the action of the trial court upon the instructions to the jury, which necessarily resulted in a verdict for the defendant. Before taking up these assignments, however, it will be in order, and will facilitate and clarify the discussion of the assignments themselves, to dispose of certain contentions of the defendant which, if sound, would defeat the plaintiff's action entirely, and make it necessary for us to affirm the judgment on the ground that no other verdict could have been properly returned, regardless of the instructions.

The first of these contentions is that the plaintiff was not in fact discharged, but quit the service of his own accord. Of this it is sufficient to say, that while the evidence is by no means clear upon the question, it was, in our opinion, one for the jury to determine. The defendants would not deal frankly with him, were moving their principal effects and main place of business out of the State, appeared to have no further position or use for him, and would give him no assurance whatever as to his future employment. Without discussing it in detail, the evidence seems to us, when viewed as a whole, to have tended to show that the company had secretly determined to drop him, and in effect had done so, before he instituted this suit and attached their estate to secure his claim. In this state of the evidence, the question whether he was discharged, or quit, was one for the jury to answer. (*Goldsmith* v. *Latz*, 96 Va. 680, 685, 32 S. E. 483.)

It is urged by the defendant, in the second place, that, as this is an action based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contains only the

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common counts in assumpsit, and that, therefore, his action must fail. This point was not made in the lower court and cannot be successfully raised for the first time here. It is true that when the plaintiff offered in evidence the written contract covering the original employment for the year 1910, the defendant objected, but the objection was not upon any such ground as is here suggested. The objection, and the sole objection indicated, was that the written contract "is not the contract in force in 1914," and that the plaintiff should "be confined to proving the contract under which he is claiming." The contract for 1910 was clearly admissible for the purpose of showing the terms of the original hiring. (26 Cyc. 976, note; 20 A. & E. Encyc., 2d ed., 16, note; *Herman* v. *Littlefield,* 109 Cal. 430, 42 Pac. 443; *Tatterson* v. *Suffolk Mfg. Co.,* 106 Mass. 56; other authorities cited *infra.*) At no time during the progress of the trial was there, so far as the record shows, any intimation that the defendant relied upon a variance between the declaration and the proof, or upon the insufficiency or inaptness of the evidence to sustain a recovery upon the common counts. Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. *Warren* v. *Warren,* 93 Va. 73, 74-6, 24 S. E. 913; *McCrorey* v. *Thomas,* 109 Va. 373, 376, 63 S. E. 1011, 17 Ann. Cas. 373.

In *Warren* v. *Warren, supra,* Judge Buchanan, speaking for this court, said: "The parties must stand or fall by the case as made in that (the trial) court. An appellate court is not a forum in which to make a new case. It is merely a court of review to determine whether or not the rulings and judgment of the court below upon the case as made there were correct. Any other rule, it has been well said, would overturn all just conceptions of appellate procedure in cases at law, and would result in making an appeal in such action

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a trial *de novo*, without the presence of witnesses, or the means of correcting errors and omissions."

Furthermore, and perhaps more directly to the point in this connection, the action of assumpsit was the appropriate remedy, if the plaintiff was entitled to recover upon the facts as proved, and, conceding that the declaration was defective, it was the duty of the defendant, if it intended to rely upon that point, to then and there call the court's attention to it. Section 3384 of the Code of Virginia, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would have been presented in the trial court if the question now made before us had been raised there. This statute has always, and most properly, been regarded with favor, and construed with liberality by the courts of this State; and its terms would have fully met the condition now complained of by defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant cannot now take advantage of the irregularity which the statute would have cured. This conclusion is in accord with the well settled policy and repeated decisions of this court. *Eagles* v. *Hook*, 22 Gratt. (63 Va.) 510, 512; *Langhorne* v. *Richmond City*, 91 Va. 364, 367, 22 S. E. 357; *Bertha Mineral Co.* v. *Martin*, 93 Va. 791, 801, 22 S. E. 869, 70 L. R. A. 999; *Moore Lime Co.* v. *Johnson*, 103 Va. 84, 86, 48 S. E. 557; *Va. & S. W. Ry. Co.* v. *Bailey*, 103 Va. 205, 228, 49 S. E. 33; *Newport News &c. R. Co.* v. *McCormick*, 106 Va. 517, 518, 56 S. E. 281; *N. & W. Ry. Co.* v. *Perdue*, 117 Va. 111, 117, 83 S. E. 1058; *Hawkins & Buford* v. *Edwards*, 117 Va. 311, 317, 84 S. E. 654; Burks Pl. & Pr., pp. 585-6-7; *Id.* p. 770.

Another contention of the defendant, urged as conclusive against the plaintiff's demand, is that he was employed

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in 1914 by the month and not by the year, and that therefore any action by him based upon a yearly contract must fail. In our view of the evidence, the question thus presented, to say the most that can be said of it for the defendant, was one for the jury to settle. The evidence certainly tended to show, if it did not conclusively show, that the plaintiff, having been originally hired for a fixed term of one year, held over in the succeeding years of 1911, 1912, 1913 and 1914, without any new agreement or different understanding as to the term of service. The only change ever made was the increase of salary in May, 1911, already pointed out. Nothing whatever appears in the record to explain the occasion or purpose of this increase, except the uncontradicted statement of Conrad that, in the course of the original negotiations with representatives of the defendant, he was hesitating about accepting their offer of $100 per month, and called their attention to the fact that he then held an equally remunerative positon which he could keep as long as he chose, whereupon Mr. Ellison, the president of the company, said: "Well, come on with us and we will give you one hundred dollars a month now, and later on will increase you." This statement was objected to at the trial solely on the ground that Mr. Ellison was then dead, but when it was made to appear that Mr. Harvey also was present during the conversation, the objection was not further urged. The statement does not appear to us to be very material in any aspect of the case. If it be left out of view entirely, the mere unexplained increase in salary would not in itself be sufficient to show any intent to convert into a monthly employment one which had commenced under a yearly contract. But the plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in determining the probable inten-

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tion of the parties continuing the relationship after the first year had expired. The contract for the year 1911, or for any succeeding year, did not exist, and is not claimed to have existed, until the preceding year had expired; but when, after the end of each year, the employment continued some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. It is to be remembered in this connection that the defendant, not the plaintiff, was relying upon the increase of salary, invoking that fact to sustain its contention that the hiring after 1910 was by the month; and, in this aspect, the case became peculiarly one for the application of the general rule permitting evidence of previous dealings and negotiations.

In *Tatterson* v. *Suffolk Mfg Co.* (Mass.), *supra*, the court used the following language, which is especially pertinent here: "There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties: which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case. It was an inference of fact, to be drawn only by the jury. The whole question, What was the contract existing between the parties, at the time the defendants undertook to terminate the employment? was properly submitted to the jury."

In the case of *Chamberlain* v. *Stove Works*, 103 Mich. 124, 61 N. W. 532, the plaintiff had worked for the defendant company for some years at a yearly salary, and then, in January, 1886, he was elected a director and secre-

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tary of the concern. Thereafter he continued to render the same service as formerly, but at an increased salary. He was also re-elected as director and secretary each succeeding year until 1892, when another person was chosen in his place. In May, 1892, he was discharged from the company's employment, and, in an action brought by him, the jury found that he was employed for a full year and that this employment continued distinct from his offices in the corporation. It was held, on appeal, that the character of the hiring was properly left to the jury and that their determination was not improper. See also Mechem on Agency (2d ed.) 602 and cases cited.

So, in the instant case, we find no difficulty in holding that, under the law and the evidence, the jury might very properly have found that the plaintiff had a contract by implication for the entire year 1914. The evidence has already been sufficiently reviewed, and the law applicable to it is perfectly well settled. The English rule is that every general hiring is presumed to be for one year, in the absence of stipulations or circumstances to rebut the presumption. (1 Min. Inst., 4th ed., p. 209; 26 Cyc. 973.) In the United States the prevailing doctrine is that every such general hiring is terminable at the will of the parties (Lile's Notes on 1 Min. Inst., p. 54; 20 A. & E. Enc., 2d ed., p. 14; 26 Cyc. 874.) Both in England and in this country, however, when one enters the employment of another for a definite period (of one year or less) and continues in that employment after the expiration of that period without any new agreement, the presumption, rebuttable of course by evidence, is that he is again employed for a like term.

"A person who has been previously employed by the month, year or other fixed interval, and who is permitted without any new arrangement to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a con-

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trary intention, be presumed to be employed until the close of the current interval and upon the same terms. This, however, is merely a presumption, and gives way before evidence that such a continuation was not intended." Mechem on Agency (2d ed.), sec. 605, p. 434. See also to the same effect, 20 Am. & Eng. Enc. (2d ed.), p. 16; 26 Cyc. p. 976; *McCullough Iron Co.* v. *Carpenter*, 67 Md. 554, 11 Atl. 176; *Wallace* v. *Floyd*, 29 Pa. 184, 772 Am. Dec. 620; *Tatterson* v. *Suffolk Mfg. Co., supra; Standard Oil Co.* v. *Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410; *Kelly* v. *Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. 984; *Douglass* v. *Merchants Ins. Co.*, 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822.

In the *Gilbert Case*, cited above, the Supreme Court of Georgia, in the course of the opinion, said:

"In the argument notice was taken of the difference between the English and the American rule as to presuming that an indefinite hiring is for a whole year. It was said that in the former country this presumption holds, but in the latter it does not. Wood, Mast. and Serv., sec. 136.

"We think, however, this presumption has nothing to do with the matter; for whether the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. When we have a definite term of service, no matter how we get it, subsequent service of the same kind, where no new contract is made and nothing appears to indicate a change of intention, may be referred to the previous understanding, and to a tacit renewal of the engagement."

Summarizing the results of the foregoing discussion, we are of opinion, (1) that the objection to the form of the plaintiff's declaration comes too late to avail the defendant in this court; (2) that whether the plaintiff was discharged, or quit the service prematurely and of his own accord, and

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(3) whether he was employed for the entire year 1914, or for a shorter period within that year, were questions upon which, under the evidence adduced, the plaintiff (to say the least of his rights upon the latter question) was entitled to a determination by the jury. And it follows further, therefore, that we cannot say, upon any of the anterior contentions of the defendant, that a verdict in its favor was necessarily proper as being the only one which could have been legally found.

This brings us to the plaintiff's assignments of error, which, in view of what has already been said, may be very briefly disposed of. They involve two rulings of the trial court, both of which were erroneous. The first was the refusal of the court to instruct the jury, at the instance of the plaintiff, "that when one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new agreement, the presumption is that the employment is continued on the terms of the original agreement, and this presumption must prevail, unless there be a new agreement shown, or at least facts which are sufficient to rebut the legal presumption and show that a different hiring was in fact intended by the parties."

This instruction contained a correct statement of the law as applicable to the case, and should have been given.

The second error complained of, and in our opinion well assigned, was the refusal of the court to give plaintiff's instruction number 1, and giving instead thereof instruction "A". Instruction No. 1, refused, was as follows:

"The court instructs the jury, that if they believe from the evidence and all the facts surrounding the contract between L. A. Conrad, and the Ellison-Harvey Co., that it was the intention of the parties to enter into a contract of employment by the year, and the said employment to commence at once, it was not necessary that the agreement

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should be in writing, and if they further believe from the evidence that L. A. Conrad was discharged on the 1st day of July, 1914, they shall find for the plaintiff, and assess his damages at such amount as he would have received in wages for the remainder of his term, less the amount earned by him from other employment."

Instruction "A" was as follows:

"The court instructs the jury that they should disregard the oral testimony on the part of the plaintiff tending to prove the contract for a year's service with the defendant covering the year 1914, for a breach of which the plaintiff sues because the statutory law requires such a contract to be in writing, or to be proven by a memorandum or other writing signed by the party to be charged."

The contract which the plaintiff claimed and sought to prove was a contract for one year's service beginning on January 1, 1914. There was no contention that the agreement for that year was made prior to the day on which it began. The evidence, both oral and written, of the previous contract and relationship between the parties was introduced for the purpose of throwing light upon the intention of the parties during the subsequent year of 1914, and as such has already shown to have been proper, even though in that way it did tend to prove a contract which came into existence during a subsequent year. It was a contract based upon implication and presumption drawn in part from previous dealings between the parties, but it was nevertheless a new contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for one year's service, to begin and be performed within the year, and consequently not within the statute of frauds, or parol agreements. 3 Min. Inst. (2d ed.) 197; 1 Chitty on Contracts (11th Am. ed.) p. 101; 20 Am. & Eng. Enc. L. (2d ed.) 48, and cases cited in note 1.

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"The position of the defendants would be correct, if the plaintiff relied upon the original negotiations as the contract upon which his action was founded. The written evidence does not show any contract which binds the defendants to employ the plaintiff for the whole of a second year. That obligation, if it exists, must be found in some agreement into which the parties had entered within the year. They did enter into some agreement, by the mere fact of continuing their relations of employment and service. It was a relation of contract. The terms of the contract, in the absence of express words, are to be ascertained, not alone by what occurred within the year, but also from all that had transpired previously. From all the evidence the jury must determine, as an inference of fact, what was the understanding with which the parties entered upon the second year of employment and service. That, when found, constitutes their contract. The contract which resulted from the original negotiations did not by its terms, and could not by reason of the statute, extend into the second year. But those negotiations were competent evidence from which to infer what were the terms of the new contract under which the parties continued their relations. We think that the jury were rightly instructed that the statute of frauds did not apply to the contract upon which the plaintiff relied; * * *" *Tatterson* v *Suffolk Mfg. Co., supra.*

The judgment complained of will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in conformity to the views expressed in this opinion.

Reversed.

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Richmond.

CORBITT V. WRIGHT.

March 15, 1917.

1. DESCENT AND DISTRIBUTION—*Theory of the Statute.*—The theory of our statute of descent and distribution is that the estate of the ancestor at his death (subject to the rights of the widow, if there be one) passes in coparcenary equally to his children.
2. ADVANCEMENT — *Hotchpot — Purchaser From Distributee.*—Virginia Code of 1904, section 2561, provides that: "Where any descendant of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he or any descendant of his shall come into partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate real and personal." Under this provision where the advancement to such descendant is equal to or exceeds his share in the estate, it bars his right to further participation; and, although the section does not refer to a purchaser from the descendant, yet such purchaser is charged with knowledge of the public statutes of the State, and only buys and can only take the interest of his grantor in the estate. The doctrine of *bona fide* purchaser has no application. The purchaser only buys the heir's interest, and when that interest is ascertained he is entitled to that and to nothing more.

Appeal from a decree of the Circuit Court of Nansemond county. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Williams, Tunstall & Thom and *W. P. Lipscombe,* for the appellants.

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J. R. Saunders, for the appellee.

WHITTLE, J., delivered the opinion of the court.

In a suit brought by appellant as purchaser of the interest of Thomas B. Wright in the real estate of which his father died seized against the other heirs for partition, the circuit court denied the relief sought by a decree which sets forth the following material facts: That Cornelius W. Wright, the father, died intestate on October 3, 1910, leaving real estate and survived by his widow and fourteen children; that by deed dated February 20, 1912, Thomas B. Wright, a son, conveyed his undivided interest in the real estate descended to plaintiff; that at the time of the conveyance no suit had been commenced for the administration of the estate, nor had any report been filed of debts and demands against it; that decedent in his lifetime had made advancements to Thomas B. Wright in excess of his interest in the estate; that plaintiff was a purchaser for value from Thomas B. Wright, and at the time of the purchase had made no inquiry and had no knowledge of the advancements to his grantor.

Upon these facts the circuit court was of opinion that at the time of the conveyance Thomas B. Wright, by reason of the advancement, had no interest in the real estate in question, and that plaintiff could acquire, and did acquire, no other or greater interest than his grantor had therein; and plaintiff in open court having expressed unwillingness to come into hotchpot, it was decreed that he had no interest in the estate.

The theory of our statute of descent and distribution is that the estate of the ancestor at his death (subject to the rights of the widow, if there be one) passes in coparcenary equally to his children. And, by Virginia Code, 1904, section 2561, "Where any descendant of a person dying intestate as to his estate, or any part thereof, shall have received

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from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he or any descendant of his shall come into partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate real and personal."

It results from this equitable method of settlement that where the advancement to such descendant is equal to or exceeds his share in the estate, it bars his right to further participation. It is true the section does not in terms refer to a purchaser from the descendant, yet such purchaser is charged with knowledge of the public statutes of the State, and only buys and can only take the interest of his grantor in the estate.

Obviously, the doctrine of *bona fide* purchaser has no application to the case. Appellant bought the heir's interest in the estate, and when that interest is ascertained he is entitled to that and to nothing more.

The general rule is thus stated in the article on "Descent and Distribution" in Cyc: "When an heir or distributee assigns his interest in an unsettled estate, the effect is to divest him of his title or right and vest the same in the assignee, who may maintain an action for such interest in his own name under the statutes allowing assignees to sue; but the assignment cannot in any way affect the condition of the administrator or of the estate. The purchaser or assignee occupies the same position that his assignor or grantor occupied, taking the interest granted, with all of the grantor's rights and subject to all of his liabilities." The text is sustained by numerous authorities cited in the notes. 14 Cyc. 136.

The same doctrine is enunciated in Ruling Case Law,

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where it is said: "The grantee of an heir's interest in the realty of his ancestor stands in the place of the heir, and in the same relation to the estate. * * * His rights are no greater than those of the heir, especially when the deed does not purport to convey any particular tract but merely such interest in the ancestor's lands as the grantor is entitled to as heir. * * * The fact that the heir has been advanced may be shown to reduce the interest received by the purchaser." 9 R. C. L., pp. 122-3, and cases cited.

The decree of the circuit court is demonstrably right and must be affirmed.

Affirmed.

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Richmond.

EWELL V. BROCK.

March 15, 1917.

1. INTERPRETATION AND CONSTRUCTION—*Questions of Law and Fact.*—It is the duty of the court to construe written instruments, when the writing is complete in itself and the subject matter of it is certain or the facts are ascertained.
2. WILLS—*Construction—Subject of Devise—Questions of Law and Fact.*—A testator in his will devised to his daughter "the farm on which I now reside." The residence of the testator was on a farm which he had acquired about thirty-five years before his death, known as Morris Neck, containing about sixty acres. About fourteen years prior to his death he purchased an adjoining farm, known as the Cooper tract, containing about thirty acres. The question before the court below was whether the Cooper tract passed under the above devise. This was clearly a case of latent ambiguity, the language in question containing a description which was equally applicable to two objects, namely, the farm consisting of the Morris Neck tract alone or the farm consisting of the two tracts. Parol evidence was essential to remove this uncertainty, and the question of identity of the subject-matter of the devise was a question of fact for the jury and not for the court.
3. APPEAL AND ERROR—*Petition for Writ of Error as a Pleading.*—A petition for a writ of error is a pleading, and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered.

Error to a judgment of the Circuit Court of Princess Anne county, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

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Thos. W. Shelton, for the plaintiff in error.

R. R. Hicks and *Peechie E. Brock*, for the defendant in error.

SIMS, J., delivered the opinion of the court.

There was a verdict of a jury and judgment for the defendant in error, plaintiff in the court below, against the plaintiff in error, defendant in the court below.

The question upon the merits of the case is the identity of the land devised by the following clause of the will of John T. Batten, namely:

"I give, devise and bequeath unto my daughter, Lena Batten, the farm on which I now reside * * *"

At the date of his will and death, the testator owned land which he had acquired at different times in separate tracts or parcels, which lay contiguous to each other. The residence of the testator was on the farm which he acquired about thirty-five years before his death, known as Morris Neck, containing about 60 acres. About fourteen years prior to his death he purchased an adjoining farm, containing about 30 acres, known as the Cooper tract or Cooper farm. The latter is the land involved in the action of ejectment before us.

The question before the court below was whether the Morris Neck farm alone was devised by the will of said testator to Lena Batten, or both the Morris Neck and Cooper farms. The plaintiff in error claims that both farms were devised to her by the will, and that the court should have instructed the jury, by a peremptory instruction, that such was the true construction and effect of the language of the will above quoted. Instructions Nos. 5 and 6 asked for by the plaintiff in error and refused by the court embodied this proposition. These instructions were as follows:

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"(b). The court further instructs the jury that the will of John T. Batten offered in evidence, vested in his daughter, Lena Batten, a fee simple title in the Cooper tract in the declaration described and she had the right to convey like good title to J. L. Ewell, the defendant in this case. If, therefore, you believe from the evidence that Lena Batten conveyed the property to said J. L. Ewell and that he still holds title to the same, then you shall find for the defendant. And the court further instructs you that the deed of bargain and sale from Lena Batten to J. L. Ewell, exhibited in evidence, is a good and sufficient deed."

"(6). The court instructs the jury that John T. Batten, by his will, conceding all parol testimony adduced in this trial to be true and allowing to it its full legal effect, devised to his daughter, Lena Batten, the property claimed in this controversy and that she has conveyed the same to J. L. Ewell, the defendant, by a good and legal deed."

Counsel for plaintiff in error bases his contention that these instructions should have been given, and that thus the court should have decided the question of the identity of the land and should have taken it from the jury, upon the authority of *Burke* v. *Lee*, 76 Va. 386, 388. That is a leading case in Virginia on the subject of the duty of the court to construe written instruments. It has been long settled that such is the duty of the court when the writing is complete in itself and the subject matter of it is certain, or the facts are ascertained.

In the case of *Burke* v. *Lee*, as the court there stated, the property involved fitted the description in the will. There was no uncertainty as to the identity of the property described in the devise, there was no uncertainty in applying the language of the devise to the property—the description to the *locus in quo*. The court said of that case as it was presented to the court below: "It was not a case of latent ambiguity in which the description is equally applicable to

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two objects, and therefore parol evidence is essential to remove the uncertainty."

The case before us is clearly a case of latent ambiguity. The language in question contains a description which is equally applicable to two objects, namely, the farm consisting of the Morris Neck tract alone, or a farm consisting of the two tracts, the Morris Neck and Cooper tracts. Parol evidence was essential to remove this uncertainty. Certainly the plaintiff in error could have had no standing in court to claim that the Cooper tract passed to Lena Batten by the devise without the aid of parol testimony. This question of identity of the subject matter of the devise was a question of fact for the jury and not for the court.

There was considerable parol evidence properly admitted by the trial court, bearing on the surrounding circumstances existing when the will was executed, the situation of the land and where the testator then resided. See 7 Ency. Dig. Va. & W. Va. Rep. 858-9 for authorities too numerous to cite here. This evidence need not be referred to by us in detail since no question is raised before us as to lack of such evidence to sustain the verdict of the jury or as to such verdict being against the evidence, but only that the court and not the jury should have decided the question of fact as to what land met the terms of the description in the will.

It is clear that the case of *Burke* v. *Lee, supra,* does not sustain the position of cousnel for appellant on this sujbect, but the contrary.

In the case before us the court below did not decide the question of fact as to the identity of the land described in the devise, but submitted that question to the jury, under the following instruction, namely:

"(1) The court instructs the jury that the will of John T. Batten devised to his daughter, Lena Batten, the farm on which he resided at the date of the will; and the jury

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are instructed that if they believe from the evidence that the property described in the declaration was not a part of the place on which said John T. Batten resided at the date of his will, then they must find for the plaintiff, but if the jury believe from the evidence that the property described in the declaration was a part of the place on which John T. Batten resided at the date of his will, then they must find for the defendant."

This action of the trial court is assigned before us as error. The ground of such assignment is the same as that above noted, urged in support of instructions Nos. 5 and 6 asked for by plaintiff in error. For the reasons above stated, we think the position on which this assignment is based is not well taken.

A number of bills of exceptions were taken by plaintiff in error, involving various questions, but we do not understand that the points thus saved are assigned in the petition as errors relied on for reversal. They were not clearly so stated in the petition, or in the reply brief of counsel for plaintiff in error, or in oral argument by him. The action of the trial judge upon one single question only, namely, that considered and passed upon by us above, seems to be assigned and relied on as error for reversal. The following is the statement of the petition on the subject:

"THE NARROW QUESTION INVOLVED IS ONE FOR THE JUDGE AND NOT THE JURY.

"The sole and simple question in this case, therefore, is whether the Cooper field was considered as, and intended to be, by John T. Batten, a part of the farm on which he resided when he wrote his will. It is on all fours with the case of *Burk* v. *Lee* (76 Va. 386), and the trial court should have followed Judge Staples' views on both the procedure and the law, which he refused to do."

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It is true certain other rulings and actions of the court below are subsequently referred to in the petition as errors, but they are not set out as errors relied upon to reverse the judgment with that clearness and distinctness required in a petition for a writ of error. Such a petition is a pleading and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered. *Sutherland* v. *Wampler*, 119 Va. 800, 89 S. E. 875; *Orr* v. *Pennington*, 93 Va. 268, 24 S. E. 928; *Haupe* v. *Bumgartner*, 103 Va. 91, 48 S. E. 554; Code of Va., sec. 3464. Hence we do not deem it necessary to consider the other matters referred to in the several bills of exception and in the petition.

Counsel for defendant in error raises some questions in his reply brief as to the bill of exceptions which purports to contain all the evidence being properly in the record, but as our opinion upon the merits of the case is in favor of the defendant in error, we do not consider it necessary to consider such questions.

Hence, for the reasons given above, the judgment complained of will be affirmed.

Affirmed.

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Richmond.

GRICE V. TODD.

March 15, 1917.

1. LANDLORD AND TENANT—*Tenancy From Year to Year—Holding Over.*—A tenant gave his landlady three months' notice that he would vacate at the expiration of that year of his tenancy. At the expiration of the year he was compelled to hold over for three days because, although he endeavored to obtain them, he was unable to get wagons to move his effects. On the fourth day he vacated the premises, and sent the keys to the landlady's agents. The landlady then elected to hold the tenant as a tenant from year to year by reason of his having held over as aforesaid. As the tenant's holding over was not voluntary, a contract of tenancy from year to year could not be implied, as no obligation will be implied in law from an act which is not voluntary. Furthermore, the facts show, not only that the action of the tenant in holding over was not voluntary, but in addition that the landlady had actual notice brought home to her of the express declaration of the tenant that he held over involuntarily, excluding any idea of further contract, before the mind of the landlady assented to the tenant's remaining over. A meeting of the minds, therefore, was impossible.
2. ASSUMPSIT—*Equitable Nature of Action Upon Quasi-Contract.*—An action of assumpsit upon a quasi-contract—which is the action in the instant case—is equitable in its nature. No recovery will be allowed in such an action which does violence to natural equity.
3. LANDLORD AND TENANT—*Holding Over—Notice of Intention to Vacate.*—Where a notice is given by a tenant of an intention to vacate under the Virginia statute (Code, section 2785) before his lease expires, such notice does not differentiate the case from any holding over by a tenant after the expiration of his term, where the holding over is after the date named in the notice when the premises should have been vacated.

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Error to a judgment of the Law and Equity Court of the city of Richmond, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

George Bryan, for the plaintiff in error.

S. A. Anderson, E. V. Farinholt and *R. R. Florance,* for the defendant in error.

SIMS, J., delivered the opinion of the court.

The facts in this case are agreed and are as follows:

"It is agreed that E. W. Grice was a tenant of Mrs. Mary V. Todd of the premises 509 W. Franklin street, Richmond, Virginia, under lease hereto attached, as part hereof, and held over for one year thereunder, which year expired August 31, 1914; that he gave three months' notice to her that he would vacate at said expiration of said year; that he held over for three days after August 31, 1914, because, although he endeavored to obtain them, he could not get wagons to move his effects on August 31, 1914, to the apartment to which he wished to move; that on September 4, 1914, he vacated said premises, and sent the keys to the agents named in the lease and that then said Mrs. Mary V. Todd elected to hold him as a tenant from year to year by reason of his having held over as aforesaid; that the said Grice denies his liability as such tenant; that the parties to these proceedings further agree that this matter shall be submitted to the judge of this court for his decision and judgment in this suit, a jury being waived."

It appears from this statement of facts that the case before us is not one where there was a holding over of the

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tenant beyond the expiration of the term of his lease *without more.* The holding over of the tenant was for three days caused by his inability to obtain wagons to move his effects, although he endeavored to obtain them. He vacated the premises on the fourth day after the expiration of his lease and tendered the keys of the premises to the landlady. The latter *then* elected to hold the former tenant as a tenant from year to year "by reason of his having held over *as aforesaid,*" not by reason of his having held over, *without more.*

Such situation presents, in effect, a case where, after the term of the lease expired, the former tenant held over, but gave notice to the landlady, explaining his possession on the ground that it was caused by circumstances over which he had no control, before the landlady exercised her right of election.

The judgment of the court below was for the landlady, plaintiff therein, the appellee here, against the former tenant, defendant therein, the appellant here.

We think there was error in the judgment of the trial court for the reasons hereinafter pointed out.

That judgment would have been right if this had been a case where there was a holding over of the possession by the former tenant, *without more.*

The uniform view of the American text-writers and authorities on the subject, where the doctrine of tenancy from year to year is recognized, is that when a tenant, who has previously rented for a term of years, or for one year, holds over possession of premises beyond his original term, without more, upon the election of the landlord to hold him as a tenant from year to year, the law implies a contract on the part of the tenant to remain and pay rent as a tenant from year to year. His holding over puts the tenant in the position of being in wrongful possession against the landlord. Such possession of the tenant is wrongful, but

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for technical reasons he is not yet a trespasser. He holds over by the laches of the landlord, who may enter at any time and put an end to the tenancy. Until the landlord takes some action in the matter, the former is a tenant by sufferance. In such situation, while the tenant is a tenant by sufferance, the landlord has the right of election to allow or refuse to allow the tenant to remain. The landlord may exercise the latter right, and if he does, from that moment the tenant is a trespasser and may be ejected. If the landlord exercises the former right, he may do so in such express terms that the latter remaining in possession will become a tenant at will. But as the law does not favor a tenancy at will, it will not imply a contract necessary to create such a tenancy. In the absence of evidence of such an express contract, if the landlord exercises his right of election to allow the tenant to remain, without more, the law implies a contract on the part of the landlord that the tenant may remain as a tenant from year to year, such a tenancy being favored by the law in the interest of a mere permanent tenure than that of a tenancy at will. Conversely, and for the same reason, where there is a holding over by the tenant, *without more*, and while such holding over exists, upon the election by the landlord aforesaid, the law implies a contract on the part of the tenant to remain and pay rent as a tenant from year to year. That is to say, in such situation, the contract creating a tenancy from year to year, whether on the part of the tenant or landlord, is implied in law, from the voluntary acts of the parties, in the absence of any agreement. I Washburn on Real Prop. (6th ed.), sec. 800, 825-6, 829; 1 Minor on Real Prop., sec. 386, 389; 1 Taylor on Landlord and Tenant (9th ed.), secs. 19, 22; Jones on Landlord and Tenant, secs. 201-209; 24 Cyc. pp. 1011-1014; 53 L. R. A. (N. S.) 235; note to 16 Va. L. Reg. 496.

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It is true that in a situation of a holding over of the former tenant, without more, very slight acts or act on the part of the landlord, which may be even inferred from a very short lapse of time, will be sufficient to conclude his election and make the person holding over his tenant, when the landlord is himself relying on the renewal agreement (Jones on Landlord and Tenant, sec. 205); but the election, however evidenced, must be exercised by the landlord before the obligation which the law implies on the part of the tenant arises.

However, in the instant case, we are relieved of any consideration of what act or acts of the landlady were sufficient to evidence her election by the agreed statement of facts, which concludes that question by the affirmative statement that the landlady did elect as aforesaid and when she so elected.

It is also true that, in the situation referred to in the next preceding paragraph, the tenant has no such right of election as the landlord has. As to the latter, "his mere continuance in possession fixes him as a tenant from year to year, if the landlord thinks proper to insist upon it." (16 Va. L. Reg., p. 496, note; 1 Taylor on Landlord and Tenant, *supra,* sec. 19.) Or as another writer puts it, concerning the contract of the former tenant to remain as a tenant from year to year, which the law implies from the mere act of the former tenant of holding over "* * * in reality the presumption is one of law, which cannot be rebutted." Jones on Landlord and Tenant, sec. 210. The authorities also hold that the intention of the former tenant in holding over is immaterial.

All of the foregoing is true because the contract of the tenant, which is implied in law, from his holding over beyond the term of his former lease, is really not a contract in fact, although spoken of as such. The relationship of the parties is *quasi ex contractu.* "The liability" (of the

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tenant) "exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded. * * *" 2 R. C. L., sec. 8.

Such an obligation may be implied in law not only without the existence of an intention to create it, but even against a contrary intention, if equity and good conscience demand it; as in case of a tort, theft, forcible taking of property (2 R. C. L., secs. 14, 15) or fraud (*Idem.*, sec. 18), or mistake, and in other cases.

With respect to both tenant and landlord, in the absence of express agreement, the law deals with the conduct of the respective parties in the light of the situation and attitude of the parties to each other, and implies a contract between them or an obligation of the one to the other, where *ex aequo et bono*, according to the principle on which the action of assumpsit is founded, it should be implied. If, however, the parties protect themselves from the contract or obligation which the law would imply in the absence of agreement between them, by express agreement, or by notice the one to the other followed by action thereon from which an express agreement may be ascertained, the law will not do violence thereto by implying an agreement in contravention thereof.

Similarly, "The law * * * will not imply a promise against the express declarations of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation, paramount to his will, to perform some duty." 4 Cyc., p. 326. And he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty.

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The English rule is the same as that above referred to as prevailing in America, to the extent that the obligation of the tenant arising from his holding over, without more, is one implied in law, upon the exercise by the landlord of his right of election aforesaid, regardless of the intention of the tenant. *Right on, &c.*, v. *Darby*, 1 T. R. 159; *Bishop* v. *Howard*, 2 B. & C. 100, 9 E. C. L. 41; *Sauvage* v. *Dupress*, 128 Eng. Rep. Reprint 163; *Dougal* v. *McCarthy*, 1 Q. B. 736; *Digby* v. *Atkinson*, 4 Camp. 275; *Riggs* v. *Bell*, 5 D. & E. Rep. 471.

There are other cases which indicate that in England the holding of the courts is more liberal than in America upon the inquiry as to when the obligation of a tenant holding over will be implied in law (see English cases referred to by the text-writers above cited); but there is no difference between the rule in England and America that whenever the obligation is implied in law, it is implied regardless of the intention of the tenant. The law supplies the intention whenever it imposes the duty, but then only. This is a distinguishing characteristic of an obligation implied in law which is universal. It inheres in the very nature of it.

The inquiry, therefore, in the instant case, whether the tenant had in fact the intention to hold over the premises from year to year is immaterial, both on principle and upon authority. But the true inquiry is: Was the situation of the parties, which was known to each other, and their conduct, such that the law will imply a contract or obligation on the part of the tenant to hold over as a tenant from year to year? Will the law impose such duty on the tenant in such situation?

As we said in the case of *City of Norfolk* v. *County of Norfolk*, 120 Va. 356, 374, 91 S. E. 825: "The fiction of an implied promise will not be indulged in every case, but only where in equity and good conscience the duty to make such a promise exists."

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An action of assumpsit upon a *quasi* contract—which is the action in the instant case,—is equitable in its nature. No recovery will be allowed in such an action which does violence to natural equity. Where an express contract, although not made, might possibly have been made by the parties, in their situation with regard to and dealings with each other and consistently therewith, or if not consistently therewith, in equity and good conscience it should have been made, the law will impose the duty and imply the necessary promise or promises to create such a contract or obligation; but not where the facts expressly proved in a case negative such possibility and also negative the existence of any demand in equity and good conscience that such a promise should have been made. That, as we stated in the case last cited, "would be in itself inequitable." *Idem;* see also 2 R. C. L. on subject of assumpsit. In such case there would be no legal obligation on the tenant paramount to his will as shown by his express declarations. 4 Cyc., *supra.* Hence the duty in question would not be imposed by the law.

In the instant case, the action of the tenant holding over was not voluntary according to the agreed statement of facts. If this was a mere pretense on the part of the tenant, or if the situation relied on by him to excuse his action as involuntary was brought about by his own default in the matter of making due efforts to provide a means of removal, so as to estop him from reliance thereon, the appellee might have taken issue upon the alleged necessity of the situation in which the tenant claimed to be placed. But by the agreed statement of facts we are relieved from any consideration of whether the action of the appellant was in truth involuntary. The agreed statement concludes this fact.

No obligation will be implied in law from an act which is not voluntary. 2 R. C. L., sec. 8; *Herter* v. *Mullen,* 159

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N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517; *Regan* v. *Fosdick*, 19 Misc. Rep. 489, 43 N. Y. Supp. 1102.

Further:

The facts expressly proved in this case show not only that the action of the tenant in holding over was not voluntary, but in addition that the appellee had actual notice brought home to her of the express declaration of the tenant that he held over involuntarily, and hence contrary to any idea of further contract, before the mind of appellee assented to the tenant's remaining over. In this situation of the parties, a meeting of their minds upon a contract in fact was impossible, and, in equity and good conscience, in this situation, there was no demand that the tenant should make such contract; hence, the tenant was under no legal obligation paramount to his will, as shown by his express declaration, to make such contract. Therefore, the law will not in such a case imply such obligation.

The American cases on the subject of the contract implied in law from the circumstance of the holding over of the former tenant beyond the expiration of his term are very numerous. Many of them are cited in the briefs of counsel for appellee and appellant; many are collated in 53 L. R. A. (N. S.), 235, note, and by the text-writers above cited. We do not find that any of such cases, which are thus cited or collated, upon examination, are in conflict with the conclusion above reached but one, and that is the case of *Mason* v. *Wierengo's Estate*, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461. In the last named case it was held:

"The fact that a tenant for a term of years becomes seriously ill shortly before the expiration of his term, and after removal operations have actually begun, does not deprive the landlord of his right to treat the tenant's failure to complete the removal before the lease expires as a renewal of the lease for another year."

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The holding in that case manifestly violates the principle upon which an obligation will be implied in law. This principle has been sufficiently discussed above and need not be again adverted to here.

The case of *Haynes* v. *Aldrich,* 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636, has also been called to our attention. That was a case where the tenant held over for three days after the end of the year on account of the illness of a boarder of a sub-tenant. There was also some other question as to whether the holding over was voluntary or involuntary on account of difficulty in procuring trucks or wagons for removal of tenant's effects, but under the facts of that case the court held that the holding over was voluntary, and that the tenant was liable for rent for another year. But there the lease contained a provision that the premises should be occupied as a private dwelling and a covenant not to sublet without the written consent of the lessor; and the tenant, without permission, had rented the premises to the sub-tenant, a boarding house keeper. Here this breach of covenant was a distinguishing feature in the case, operating against the tenant by way of estoppel, preventing his relying upon the incident of illness which arose, since it was because of his breach of covenant that this hindrance to his delivery of possession was made possible. The court reserved its decision upon the case of an involuntary holding over in no way the fault of the tenant.

There are a few other cases where the obligation in question has been held as implied in law, where there were positions taken by the tenant and notice thereof given to the landlord which, if they had occurred after the tenant's term expired, would have been inconsistent with the possibility of any contract in fact to create a tenancy from year to year, but these positions were taken *before* the prior term of the tenant expired, and the holding over thereafter was unaccompanied by any notice to the landlord of any

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controlling necessity which rendered the action of the tenant involuntary (as in the instant case) before the landlord exercised his right of election aforesaid—hence the holding over was left, as in other cases of holding over without more, for the law to act upon.

It should be noticed further that we do not discuss the circumstance that in the instant case a notice was given by the tenant under the statute in Virginia, before his lease expired, because under the authorities (53 L. R. A., N. S., note, *supra*) it seems clear that such a notice does not differentiate the case from any holding over by a tenant after the expiration of his term, the instant case being a holding over after the date named in the notice when the premises should have been vacated.

Upon the whole case, therefore, for the reasons given above, we are of opinion that there was error in the judgment complained of, and it will be reversed.

Reversed.

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Richmond.

HODGES V. RICHMOND CEDAR WORKS.

March 15, 1917.

1. DRAINS AND SEWERS—*Constitutional Law.*—The Virginia drainage laws, embodied in sections 2576-2579, Code of 1904, are constitutional.
2. DRAINS AND SEWERS.—The primary question of the public use and necessity of drainage rights in general has been determined by the legislature, and this will be controlling with the courts, in the absence of something to show a palpable want of foundation for the legislative pronouncement.
3. APPEAL AND ERROR—*Drains and Sewers—Proceeding Under the Code.*—In a proceeding under the provisions of section 2576, Code of 1904, to determine the right of drainage through the lands of another, where none of the evidence is certified on writ of error by defendant, it will be presumed that a proper case was made out.
4. DRAINS AND SEWERS—*Appeal and Error.*—The statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal.
5. DRAINS AND SEWERS—*Validity of Proceedings to Establish Drains Over Another's Land.*—In a proceeding under section 2576 of the Code of 1904, to establish a right of drainage over the lands of another, the commissioners reported and the court approved a different location for the drain from that asked for in the original petition of the applicant. There is nothing in the statute to indicate a purpose to confine an applicant to the mode of drainage originally contemplated or proposed by him, if he is willing to accept another which the commissioners and the court deem proper. The new or modified mode then becomes the "mode proposed by the applicant" within the meaning of the law.

Error to an order of the Circuit Court of Norfolk county, in a proceeding to obtain a right of drainage under sections

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2576-2580 of the Code. Order for petitioner. Defendant assigns error.

Affirmed.

The opinion states the case.

R. H. Bagby, for the plaintiff in error.

R. W. Mallet and *W. W. Starke,* for the defendant in error.

KELLY, J., delivered the opinon of the court.

The Richmond Cedar Works, a private corporation, desiring to drain certain of its lands through the lands of Hiram Hodges, instituted this proceeding in the Circuit Court of Norfolk county, under the provision of section 2576 of the Code of Virginia. The right of drainage was granted by the court, and thereupon Hiram Hodges obtained this writ of error.

The first contention made by the plaintiff in error, and made in this court for the first time, is that the statute under which the proceeding was conducted is, at least as applied to this case, unconstitutional, as authorizing the taking of private property for private use.

Statutes of the same general character as the Virginia drainage laws, embodied in sections 2576-2579 of the Code, have been in force in many of the States of the Union for a long period of years, and their constitutionality is too well settled to admit of serious doubt. 1 Lewis on Eminent Domain (2nd ed), sec. 185; Cooley's Const. Lim. (7th ed.), p. 767; 15 Cyc., 594.

It is easy to conceive of individual cases of such mere private purpose as not to be within the legitimate scope of

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the statute; but the primary question of the public use and necessity of drainage rights in general has been determined by the legislature, and this will be controlling with the courts in the absence of something to show a palpable want of foundation for the legislative pronouncement. 1 Lewis Eminent Domain (2nd ed.), sec. 158, p. 409; 15 Cyc., 581; Cooley's Const. Lim. (7th ed.), p. 774.

In 2 Min. Inst. (4th ed.), 25, 26, the distinguished author says:

"In Virginia, a right to drain one's lands through those of another, or under the beds of mill-canals, may be acquired as an easement, by grant, reservation or prescription (*Sanderlin* v. *Baxter,* 76 Va. 299, 44 Am. Rep. 165), or by an order of the county court, the damages to be paid to the land owner being ascertained by means of a writ of *ad quod damnum,* by five commissioners, freeholders (any three of whom may act.) V. C. 1873, Ch. 120, secs. 13 to 17; V. C. 1887, Ch. 114, secs. 2576 to 2579.

"A question has been raised as to the constitutional power of the legislature to authorize the taking of one man's lands, although for just compensation, for the private benefit of another.

"It seems to be generally admitted that it is not competent to a constitutional government to do it. But where, although a private person is the immediate beneficiary, an advantage results to the public, the appropriation is thereby legitimated. In the case under consideration, the public is or may be benefited in point of health, and of the increased production of the lands, so that there would seem to be no room to impeach the provision in question on the ground suggested. See Cooley's Const. Lim. 532 and *seq.,* 538 and note 2.

"The public necessity which may exist for thus exercising the State's right of eminent domain is to be determined exclusively and finally (like all other political questions)

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by the legislature, or as the legislature shall direct. And the courts can interpose, if at all, only where there is no foundation for a pretence that the public is to be benefited thereby, if such a case can occur. Cool. Const. Lim., 538; *People* v. *Smith,* 21 N. Y. 597; *Varick* v. *Smith,* 5 Paige (N. Y.), 159, 28 Am. Dec. 417; *Beekman* v. *S. S. R. R. Co.,* 3 Paige, 45, 22 Am. Dec. 684; *Id.,* 686 and *seq.,* elaborate and lucid notes of the editor."

It is to be observed that the Virginia statute does not undertake to designate the particular circumstances under which the right of drainage shall be granted, but leaves it for the court to determine in each case whether it is proper to grant the right. In the instant case, none of the evidence is certified and we must presume that a proper case was made out. See *Anderson* v. *Kerns Draining Co.,* 14 Ind. 199, 77 Am. Dec. 63.

Furthermore, the statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts here not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal.

In *Purdy* v. *Erie R. Co.,* 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, 672, the court said: "The objection that the statute was an invasion of the defendant's property rights, and contravened, for that reason, either the Constitution of the United States or the Constitution of this State, does not anywhere appear in the record; and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose* v. *Crockfort,* 44 N. Y. 415; *Delaney* v. *Brett,* 51 N. Y. 78." This rule seems to apply, as we think it ought to apply, with especial force to cases where, as here, the constitutionality of the statute depends upon questions of fact as well as of law. 2 Cyc. 664, and cases cited in notes 44 and 45.

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The only other question raised by the plaintiff in error is that the statute was not complied with because the commissioners reported and the court approved a different location for the drain from that asked for in the original petition of the applicant. The essential facts in this respect are that the commissioners were directed by the court to report upon the propriety of granting the application, and also, in the very terms of the statute, to "inquire and report whether the mode of draining his land proposed by the applicant be proper," and to "describe the same specifically." The location proposed by the applicant was specified in its petition. A majority of the commissioners, after a view of the premises and a full hearing of all the evidence submitted, reported that, in their opinion, it was proper to grant the application, and that the mode of draining proposed by the applicant was proper, subject to a change or modification which they recommended. The court, not regarding the report sufficiently specific to fully define the right to be granted, recommitted the same to the commissioners for an amendment, which was accordingly made. Their report, as amended, was confirmed, and the right of drainage granted did not in all respects conform to the specifications in the petition. In this we think there was no error.

The terms of the statute are very general, and no special forms of procedure are prescribed. There was no requirement that the applicant should proceed by petition or should specify in his application the mode of drainage proposed by him. It was sufficient that this mode be made to appear in some satisfactory way to the defendant land owner and to the commissioners, so that the latter might hear both parties, obtain full information, and report intelligently to the court with regard to the matter. There is nothing in the statute to indicate a purpose to confine an applicant to the mode of drainage originally contemplated or proposed

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by him, if he is willing to accept another which the commissioners and the court deem proper. The new or modified mode then becomes the "mode proposed by the applicant" within the meaning of the law.

Having due regard to the rule that such enactments must be strictly followed, we are of opinion that the proceedings in this case have fully and fairly complied with the Virginia drainage statute, and that the judgment must be affirmed.

Affirmed.

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Richmond.

MOTLEY v. HODGES.

March 15, 1917.

1. VENDOR AND PURCHASER—*Mistake in Quantity.*—In contracts of sale by the acre, a court of equity holds the vendor liable for a deficiency on the ground of mistake.
2. MORTGAGES AND DEEDS OF TRUST—*Trustee's Sale—Deficiency in Quantity.*—The purchaser at a trustee's sale can not maintain, against the beneficiary and trustee in an ordinary deed of trust on land to secure debts, a suit for a deficiency in acreage. In such transaction there is no element of guaranty or warranty, either of title or quantity of the land. To such a sale the principle of *caveat emptor* applies.

Appeal from a decree of the Circuit Court of Pittsylvania county. Decree for complainant. Defendant appeals.

Reversed.

The opinion states the case.

Jas. L. Tredway and *S. A. Anderson,* for the appellant.

Clement & Clement, for the appellee.

WHITTLE, P., delivered the opinion of the court.

The case is this: Woody by two deeds conveyed a tract of land described as containing seventy acres, more or less, to James L. Tredway, trustee, in trust to secure distinct debts due to appellant. The land was sold at public auction and knocked out to the creditor at $875, who shortly thereafter transferred his bid to appellee, Hodges, who com-

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plied with the terms of sale, and by direction of Motley the trustee conveyed the land to him and paid the proceeds to Motley. The purchaser subsequently had the land surveyed and found that the boundary only contained 46¼ acres. Thereupon, Hodges filed his bill against Motley and Tredway, trustee, to recover for the deficiency in acreage. From a decree granting the prayer of the bill against Motley this appeal was granted.

The judge of the circuit court apparently rested his decision upon the principle of that line of cases which, speaking generally, deal with what are known as contracts of sale by the acre in contradistinction to contracts of hazard. In cases which belong to the former class, a court of equity holds the vendor liable for the deficiency on the ground of mistake. This subject is lucidly treated by Judge Baldwin in the leading case of *Blessing's Admrs.* v. *Beatty*, 1 Rob. (40 Va.) 304. Yet, obviously, the case in judgment is not of that type. Indeed, in the instant case, the former owner of the land is not a party to the litigation; but, as remarked, the suit is between the purchaser at a trustee's sale, on the one hand, and the beneficiary and trustee in an ordinary deed of trust on land to secure debts, on the other. In such transaction there is no element of guaranty or warranty, either of title or quantity of the land.

In a note to the case of *Petermans* v. *Laws*, Va. Rep. Ann. (6 Leigh), 476, it is said: "A purchaser of land at a public sale made by a trustee must look to the title of the grantor of the land, and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of *caveat emptor* applies. *Fleming* v. *Holt*, 12 W. Va. 143, citing the principal case, and *Saunders* v. *Pate*, 4 Rand. 8; *Sutton* v. *Sutton*, 7 Gratt. (48 Va.), 234, 56 Am.

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Dec., 109; *Finlay* v. *Toncray*, 2 Rob. 374; Rawle Cov., 418; *Goddin* v. *Vaughan*, 14 Gratt. (55 Va.), 117."

In *Sutton* v. *Sutton*, *supra*, Baldwin, J., who delivered the opinion of the court, states with convincing ability the reasons why a purchaser at such sale cannot hold either the trustee or the creditor liable for any defect in the title or deficiency in the quantity of the land sold as follows: "The principle upon which equity relieves against a mistake in the estimated quantity of land sold, has no application to a case like this. The foundation of such relief is, that the price agreed upon by the parties must be presumed to have been influenced by the estimated quantity, unless it appears that they intended a contract of hazard; and the mistake is corrected not only in cases of deficiency, but also in cases of excess. Here there was no estimate of the quantity as between the trustee and the purchaser, but a mere statement thereof in the grantor's conveyance to the trustee. That statement was mere matter of description, and was no element of the contract between the grantor and the trustee, for which the consideration enured not from the trustee, but the *cestuis que trust*, and was in no wise dependent upon the supposed quantity of the land. The purpose of the conveyance was that the property should be sold by the trustee, at all events, for whatever it would bring, and the grantor undertook no responsibility either as to title or quantity. If the quantity had turned out after the sale by the trustee to be greater than that mentioned in the deed, neither he, nor the grantor, nor the *cestuis que trust*, could have exacted from the purchaser compensation for the excess; and by parity of reason, they are not responsible for a deficiency. There is no principle, therefore, whether of defective title or deficient quantity, upon which the appellee is entitled to relief * * *"

The authorities cited are conclusive of the question involved, and further discussion of it is unnecessary.

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For these reasons, the decree of the circuit court must be reversed.

SIMS, J., dissenting:

This case involves an executed contract of sale by a trustee.

The suit of appellee, plaintiff in the court below, was in equity to recover the value of a deficiency in quantity of land sold by the acre. The court below had jurisdiction to give relief in such a case on the ground of mutual mistake of fact affecting the substance of the thing contracted for. *Blessing's Admr.* v. *Beatty*, 1 Rob. 266, Va. Rep. Ann., note, p. 252; *Kelly* v. *Riley*, 22 W. Va. 249; *Rogers* v. *Pattie*, 96 Va. 498, 31 S. E. 897.

It is true that if in this case there had been no mistake affecting the identity or quantity of land bought and conveyed, and there had been merely a failure of title to a part or the whole of it, unless the vendor was aware of a fact from which the defect of title arose and which the vendee had no means of knowing, and there was a fraudulent misrepresentation or concealment of such fact on the part of the vendor, the vendee would have no remedy save upon the covenant of warranty in his deed. In such a case of failure of title, where there is no warranty in the deed or where, as in the case at bar, there is a special warranty only, the vendee would have no remedy. "The rule '*caveat emptor*' strictly applies." *Beale* v. *Seiveley*, 8 Leigh (35 Va.), 672-5. The mutual mistake upon which a court of equity will grant the relief in question must be a mistake of fact (see authorities cited 9 Enc. Dig. Va. & W. Va. Rep. 861) not a mistake of law (*Idem*, 861-3) and must affect the substance of the thing contracted for. *Rogers* v. *Pattie*, 96 Va. 498, 31 S. E. 897; *Thompson* v. *Jackson*, 2 Rand. (24 Va.) 504, 507, 15 Am. Dec. 721; *Classell* v.

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Thomas, 3 Leigh (30 Va.), 113. A mistake as to title, when the party making it has knowledge of the facts or means of knowledge, is a mistake of law (*Zollman* v. *Moore*, 21 Gratt. [62 Va.], 313), and does not affect the substance of the thing contracted for but merely the title to it. This distinction is fundamental in principle and underlies the *caveat emptor* rule. Hence it is that where the mistake is merely one of *title*, and there is a conveyance by a trustee without warranty or only with special warranty of title, equity affords no remedy to the vendee for deficiency in the quantity of the thing contracted for. *Sutton* v. *Sutton*, 7 Gratt. (48 Va.) 234, 56 Am. Dec. 109; *Peterman* v. *Laws*, 6 Leigh (33 Va.), 523; *Findlay* v. *Hickman*, 10 Leigh (37 Va.), 354. This is not because the conveyance is by a trustee but because the conveyance is without warranty, or only with special warranty, of title, and the rule would be the same where applied to the conveyance of any vendor. *Beale* v. *Seiveley*, *supra*.

Therefore, the circumstance that the conveyance in the case at bar was by a trustee is of no distinguishing importance. There may be mutual mistake as to quantity in any sale by a trustee equally as in sales by other vendors.

In the case of *Sutton* v. *Sutton*, *supra*, this court in effect so held. That was a case of a sale by a trustee; a deficiency in the quantity of the land contracted for due to a defect in its title, and there was no warranty in the deed from the trustee; and not by the acre. The purchase price was a sum in gross. There was no evidence of an actual sale by the acre. There was not even a deed by the trustee to the purchaser referring to the land as containing a definite number of acres, but a mere endorsement of a conveyance by the trustee on the original deed of trust, mentioning no acreage and conveying merely "all the right, title and interest" conveyed to the trustee by the original deed

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of trust. It is true that it was held therein that the vendee was not entitled to any relief, but as appears from the opinion of the court by Baldwin, J. (the same distinguished judge who rendered the opinion in the case of *Blessing's Admr.* v. *Beatty, supra*) it was so held, not because that was a sale by a trustee, but because it was not a case of a mistake as to the identity, or in the estimated quantity of the land where, says the opinion, "* * * the foundation of the relief is that the price agreed upon between the parties must be presumed to have been influencd by the estimated quantity unless it appears that they intended a contract of hazard." "Here," says the court (speaking of that case) "there was no estimate of the quantity as between the trustee and the purchaser * * * and was no element of the contract between the grantor and grantee." If that had been such a case, the opinion, by necessary implication, is to the effect that the vendee would have been entitled to relief, although he purchased from a trustee. The court held in such case that, "* * * if there was any mistake, it was not of that nature. The property sold was the identical property conveyed by the deed; and there was no room for any mistake unless in regard to the validity of the grantor's title. A mistake in regard to that matter is no ground for relief to a purchaser when he takes upon himself the risk as to title, as he does when he purchases land without agreement, express or implied, for a conveyance with warranty of title." And it was on the latter ground that the relief in that case was granted, and not because it was a sale by a trustee.

In the instant case the sale was expressly by the acre, and it expressly appears that the amount of purchase money was fixed by the estimated quantity of the land. Therefore, the case falls within the general line of authorities in Virginia on this subject. See note to case of *Blessing's*

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Admr. v. *Beatty*, 1 Rob. (Va. Rep. Ann.), 251 *et seq.* Of course, if in case of such mistake, the trustee acting *bona fide* and without notice of it had paid over the purchase money to the *cestui que trust* before suit is brought, equity will put the saddle on the right horse and the *cestui que trust* should refund the value of the deficiency. This was required to be done by the decree complained of. Hence, there was no error in such decree, and it should be affirmed.

Reversed.

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Syllabus.

Richmond.

MURPHY'S HOTEL COMPANY, INC., AND OTHERS v. HERNDON'S ADMINISTRATOR AND OTHERS.

March 15, 1917.

1. PRESUMPTIONS AND BURDEN OF PROOF—*Testimony Peculiarly Within Knowledge of the Party to the Suit.*—When a defendant who can, by his own testimony, throw light upon matters at issue necessary to his defense and peculiarly within his own knowledge if the facts exist, fails to go upon the witness stand, the presumption is raised and will be given effect to, that the facts do not exist.
2. PRESUMPTIONS AND BURDEN OF PROOF—*Testimony Peculiarly Within Knowledge of the Party to the Suit—Parties to Deed of Trust.*—Where the debtor and grantor in a deed of trust testified as to the circumstances under which the deed and the notes which it evidenced were given, no presumption arises from the failure of the beneficiaries in the deed to testify, where it does not appear that the facts in regard to the execution and the delivery of the notes in question were peculiarly within their knowledge, there being no allegation in the pleadings of any collusion between the debtor and the beneficiaries. Although the beneficiaries had knowledge of the consideration furnished by them, this was not peculiarly within their knowledge. It was equally within the knowledge of their debtor, who admitted the validity of the consideration.
3. MORTGAGES AND DEEDS OF TRUST—*Consideration.*—Under section 24 (Code 1904, section 2841-a) of the negotiable instruments law of Virginia, a deed of trust and notes secured by it are *prima facie* evidence of a valuable consideration, in the absence of affirmative evidence of lack of consideration.
4. WITNESSES — *Impeachment—Consideration.*—Contradictory statements of the grantor of a deed of trust as to the consideration of the deed supply no affirmative proof tending to show that such consideration was lacking.
5. FRAUDULENT CONVEYANCES—*Presumption.*—The circumstance that counsel for one of the deed of trust creditors was also counsel for the debtor is no evidence of fraudulent collusion between the debtor and the deed of trust creditors, especially in the absence of any charge of fraud in the pleadings.

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Syllabus.

6. MORTGAGES AND DEEDS OF TRUST—*Laches.*—Where a remainderman gives a deed of trust enforceable upon the death of the life tenant no presumption arises against the validity of the deed of trust from a failure of the creditors to assert their debts before the death of the life tenant.
7. MORTGAGES AND DEEDS OF TRUST—*Delivery of Notes.*—Upon suit to enforce a deed of trust the delivery or nondelivery of the notes secured by it is immaterial. The deed of trust is in itself sufficient evidence of the existence of the debts, in the absence of any proof of their payment subsequent to its delivery.
8. MORTGAGES AND DEEDS OF TRUST—*Decree Directing Release of Deed—Pleading.*—A decree of court directing the release of a deed of trust to secure notes payable to the holder or holders thereof could not be valid, unless based upon some pleadings putting in issue before the court whether there was or were any holder or holders of such notes. The existence of an issue in a cause is essential to the exercise of the jurisdiction of the court. There must be some proceeding by which the issue between the parties in interest is presented to the court for decision, and, moreover, all such parties must be given an opportunity to be heard thereon. An *ex parte* report of a special commissioner is not a pleading tendering such an issue.
9. MORTGAGES AND DEEDS OF TRUST—*Decree Directing Release of Deed—Parties.*—Where the holders of notes secured by a deed of trust were not made parties to the suit, or given notice thereof, a decree directing a release of the deed is void.
10. MORTGAGES AND DEEDS OF TRUST—*Decree of Release—Notice of Invalidity.*—A void decree of court directed the trustee in a deed of trust to release the deed. The trustee's deed of release showed on its face that the trustee did not act of his own volition, but under a decree of court, which decree was referred to. The release deed further referred to the report of an *ex parte* special commissioner for the facts on which the decree was based. The release deed itself, of record, therefore, put every subsequent purchaser for value and creditor upon notice of what an examination of the papers and proceedings in the suits would have disclosed, namely, that the decree was void and the release deed a nullity.

Appeal from a decree of the Chancery Court of the city of Richmond, in a chancery suit wherein the appellees filed their petition. Decree for petitioners. Respondents appeal.

Affirmed.

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The opinion states the case.

A. B. Dickinson, for the appellants.

Wm. P. De Saussure, for the appellees.

SIMS, J., delivered the opinion of the court.

This suit involves a controversy between appellants, judgment lien creditors of Mrs. Mary Lee Benet (formerly Mrs. Bitting) and appellees, who claim to be lien creditors of the same debtor by virtue of a deed of trust prior in date and time of recordation to the obtaining and docketing of the judgments of appellants.

Appellants claim that the debts of the appellees never in fact existed for lack of consideration, that the notes evidencing such indebtedness were never negotiated by the maker, Mrs. Benet—that is to say, were never delivered to appellees or to any one for them so as to be beyond the control of Mrs. Benet; and that the deed of trust was released by a release deed valid as to appellants, so that the lien of their judgments attached to and binds the property conveyed by the trust deed giving the latter a prior lien thereon.

The property conveyed by the deed of trust was the interest of Mrs. Benet in the Ford trust estate. The latter consisted of real estate and personal property. The interest of Mrs. Benet was not expected to vest and did not become vested until the death of her mother, Mrs. Ford. The latter did not die until the fall of 1908. The character of this interest in property and of the four original chancery suits successively instituted in the court below, involving said Ford trust estate, appears in a general way from the case of *Brown* v. *S. H. Ford et als,* 120 Va. 233, 91 S. E. 145.

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The deed of trust in question under which appellees claim, was duly executed June 11, 1898, and duly recorded on June 16, 1898. Edgar Allan, Jr., was the trustee named therein. The name of only one of appellees appears in this deed of trust, viz., Henry McBride. The debt asserted by him is secured by the deed of trust and is stated therein to be evidenced by the note of Mrs. Benet (then Mrs. Bitting), dated in January, 1896, payable 12 months after date to him or his order. The debts asserted by the other appellants, Williams, Sharp and Herndon's administrator, secured thereby, are stated in the deed of trust to be evidenced by two notes of Mrs. Benet (then Mrs. Bitting), one note dated June 10, 1898, and the other April 10, 1897, both payable to her order and endorsed by her.

The deed of trust provided that at any time after the title to said interest in said property should by reason of the death of Mrs. Ford become vested in fee simple in Mrs. Bitting (later Mrs. Benet) the trustee should, upon request of the beneficiaries thereunder, or the holder or holders of any notes thereby secured, sell, etc. The deed of trust was placed on record by Edgar Allan, Jr., trustee. The notes in question were on June 11, 1898, the same day the deed of trust was executed, placed by the said maker of them in the hands of Edgar Allan, Sr., who was then her attorney at law, accompanied by a statement in writing, designated in the record as paper "X," which was signed by Mrs. Bitting (later Mrs. Benet) and Edgar Allan, Sr. This paper in effect stated that Mrs. Bitting left in the hands of Edgar Allan, Sr., the notes above mentioned. This paper merely lists the note in favor of Henry McBride by stating that it was the note of Mrs. Bitting "to Henry McBride for $400.00." It describes one of the other notes by stating that it was "Her note for $825.00 endorsed to Edgar Allan as attorney to be applied to the payment of the following amounts: Solon T. Williams $100.00, Thomas Sharp $500.00

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and Mrs. John L. Hopkins $150.00" (the latter not involved in this suit), "the excess to be applied to payment of interest on the note of Thomas Sharp." It describes the remaining note in question as, "Her note of $300.00 endorsed by her to Edgar Allan, attorney, for the payment of her indebtedness to J. F. Herndon." These notes and the paper "X" remained in the possession of Edgar Allen, Sr., until his death in October, 1904, and were found among his papers after his death.

Mrs. Ford died in the fall of 1908, as above stated. In March, 1909, Edgar Allan, Jr., and his mother, as executor and executrix of Edgar Allan, Sr., deceased, and Edgar Allan, Jr., trustee (also as trustee in other deeds of trust not necessary to be mentioned), by petition, filed in the two of said original chancery suits first instituted, set up the fact that said notes and paper "X" were found among the papers of their testator; alleged that the debts evidenced thereby were valid and subsisting debts, had never been paid by Mrs. Benet, and asking that their payment should be enforced against said interest of Mrs. Benet in said property; that an account of debts against such interest in such property be taken, with their liens and priorities; and that all of such debts be enforced and paid. None of appellees were made parties to this petition.

Accordingly decree was entered directing such accounts and Commissioner Jackson Guy filed his master commissioner's report dated June 25, 1909, in which he reported in favor of Henry McBride his said debt as evidenced by said note payable to him or order and secured by said deed of trust. He alike reported in favor of "Allan, Edgar's executors," the debts evidenced by the two other notes in question above mentioned. With respect to the $825.00 note, he reported that the paper "X" shows "that it was given by Mary Lee Benet to Edgar Allan as attorney, to collect and apply its proceeds to Solon T. Williams $100.00,

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to Thos. Sharp $500.00, and Mrs. John L. Hopkins $150.00, the excess to be applied to the interest on the note of Thos. Sharp. Mrs. Benet states that these parties live in Seattle. The note itself is in the possession of the executors of Edgar Allan, deceased, but they make no claim to it. With respect to the $300.00 note he reported that it was in the possession of same executors, but that the paper "X" shows "that it belongs to John F. Herndon, who, I understand, was the first husband of Mary Lee Benet, and is dead."

There was no exception to this report. However, it was never confirmed by any decree of court, but remained filed among the papers of the cause unacted upon by the court.

In this condition of the record, on December 22, 1910, certain special commissioners, who had been appointed by prior decree in said four original chancery causes, filed their report in such causes. These commissioners had been appointed to make sale of certain real estate involved in such suits composing a part of the said property, the interest of Mrs. Benet in which was conveyed by said deed of trust, and they were appointed for no other purpose. However, they reported that they had sold a certain piece of real estate; that the purchaser had had the title examined and found said deed of trust recorded as a lien thereon. These special commissioners further say in such report, "upon knowledge and belief" the following, in effect:

1. That the McBride note "was never negotiated;" that no consideration therefor ever existed; that the special commissioners had no knowledge whatever as to McBride and could not say whether he was living or dead, but that such note was never delivered to him, being then in the pos-

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session of Edgar Allan, Jr., trustee in said deed of trust, who laid no claim to it.

2. That the two other notes in question were never negotiated or discounted; that no consideration therefor ever existed; that it was true that a paper was found among the papers of the late Edgar Allan setting forth the manner in which the proceeds of such notes were to be applied, but that the latter was the attorney for Mrs. Benet and such notes were in the possession of Edgar Allan, Jr., trustee, at the date of such special commissioners' report; and that he laid no claim to them. They added with respect to the Herndon note, that they were informed that a loan was to have been made to Mrs. Benet by Herndon, and the note was executed for that purpose, but that the making of the loan was never consummated. The commissioners then say that they feel it their duty to ask for the removal of the lien of said deed of trust and they "suggest to the court that Edgar Allan, Jr., trustee, may be made a party defendant to these causes, and may by an order entered herein be authorized and directed to execute and record a proper deed releasing the said deed of trust to him as trustee," as to the notes evidencing the debts afterwards asserted by appellees, and that he attach to and record with the release deed all of such notes.

No pleading was before or at that time filed putting in issue the facts stated in said special commissioners' report, or making Edgar Allan, Jr., trustee, a party defendant "to these causes," or in any cause, upon such issue. Nor was the executor or executrix of Edgar Allan, Sr., impleaded upon such issue, nor McBride, nor any of the other appellees; nor did any of these parties appear in this cause at or before this time and make or respond to any such issue, or have any notice of such decree being asked for. Nevertheless, on the same day on which said special commissioners' report was filed, to-wit, on December 22, 1910, decree was

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entered in said four chancery causes directing Edgar Allan, Jr., trustee, to execute and record a good and sufficient deed releasing said trust deed as to the notes therein described, evidencing the debts of appellees.

Accordingly, on January 3, 1911, Edgar Allan, Jr., trustee, executed and recorded a release deed to Mrs. Benet of said deed of trust. In this release deed he referred to said special commissioners' report and to what it "set forth" in regard to said notes never having been negotiated, and that they were "still in the possession of Edgar Allan, Jr., trustee, who made no claim to same," and to said decree of December 22, 1910, as his authority for releasing such trust deed.

The suit before us arose upon petitions and amended petition of appellants filed in April, 1912, in the four original chancery suits above referred to, and the issues made by answers of appellants to such petitions.

Mrs. Benet, by her answers to such petitions, admitted the validity of appellees' debts.

Upon these issues, Mrs. Benet testified in support of appellees' debts and stated that she had always recognized their validity and wanted their lien enforced; that all of petitioners except Herndon's administrator were, at the times the debts to them were contracted, and have been since, citizens and residents of Seattle, in the State of Washington; that her indebtedness to McBride was for attorney's fees for representing her in suit for divorce against her former husband, C. C. Bitting; that her indebtedness to Williams was for professional services to her; and that her indebtedness to Sharp was for board and maintenance of herself and little child; that the debt to Herndon was for money loaned her by him; and that while Edgar Allan, Sr., was her attorney at the time said notes and paper "X" were delivered to him by her, such delivery to him was made to be held by him as attorney for appellees.

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None of appellees except Herndon's administrator testified in the case.

Mr. R. H. Talley, one of the special commissioners aforesaid and also one of the appellants, a judgment creditor of Mrs. Benet, testified that the latter had always contended that the debts of appellees were not valid and that they should not have been reported by Commissioner Guy. Mr. Talley is corroborated in his testimony by Mr. Edgar Allan, Jr., and Mr. Stewart H. Ford.

Mr. A. J. Bradley, administrator of Herndon, testified that he was present at the interview between Mr. Talley and Mrs. Benet and that she stated to Mr. Talley that the debts of McBride and Sharp were incurred for full consideration; that they were sacred, and that she wanted them paid.

There was another master commissioner's report—that of Commissioner Shield—filed August 13, 1914, which reported in favor of the validity of the debts of appellees; that the decree of December 22, 1910, was void; that the said release deed executed thereunder was of no effect; and that the debts of appellees had priority of lien over the judgment of appellants. There were exceptions to this report by appellants, and on August 2, 1915, the decree complained of was entered, which, in effect, held as follows:

1. That the execution and recordation of said deed of trust securing the payment of the notes involved in the controversy in this suit, and the delivery of such notes by Mrs. Benet to Edgar Allan, Sr., under the direction contained in the paper "X" with Commissioner Guy's report, taken in connection with the subsequent facts and circumstances shown in the record, constituted a valid lien on the property conveyed by said deed of trust and an irrevocable appropriation of said notes and the security given therefor to the payment of the debts of appellees;

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2. That appellees were necessary parties to any proceeding seeking to affect the validity or priority of such lien;

3. That as appellees were not parties to the proceeding in which the decree of September 22, 1910, was entered, such decree was void and the release deed a nullity.

The petition of appellants on appeal from such decree contains four assignments of error, which are as follows:

"First. It appears from the record that upon filing the petitions of Sharp, McBride and others, in April, 1912, the validity of the indebtedness evidenced by said notes, and of the delivery of said notes, and the *bona fides* of the transaction, were directly put in issue by the answers of said petitions. Although this was done, it appears from the record that neither of the petitioners ever appeared before the commissioner at any time or in any manner in these causes to testify or offer any evidence other than that of Mary Lee Benet herself in support thereof. It further appeared that all of said petitions were presented by the counsel of record for Mary Lee Benet herself in the combined four causes. It further appeared that for years prior to the filing of said petitions Mary Lee Benet had persistently denied the validity of the notes, the validity of the delivery thereof and the validity of the lien by which they were secured. Your petitioners insisted before the commissioner and before the Chancery Court of the city of Richmond that under these circumstances the silence of Sharp, McBride and others raised the presumption which should be given effect to that the indebtedness alleged in the petitions of Sharp, McBride and others did not exist; that it was solely in their power to prove the existence of the indebtedness and the consideration therefor; that said notes had been delivered to Edgar Allan, Sr., for their benefit, if the fact existed, could have been proven by them; and that their continued and persistent silence for fourteen years, although the validity of the transaction had been

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directly put in issue; that all of these facts and circumstances raised such a presumption against the petitioners that could not be overcome by the unsupported testimony of Mary Lee Benet, who had for years thereto denied the validity of the whole transaction. *Copperthite* v. *Loudoun Nat'l Bank*, 111 Va. 70, 68 S. E. 392; *Aragon Coffee Co.* v. *Rogers*, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623; *Kirby* v. *Talmadge*, 160 U. S. 383, 16 Sup. Ct. 349, 40 L. Ed. 463.

"In addition to the burden of proof resting upon Sharp, McBride and others, and in addition to the presumption raised by their failure to offer one word in support of the contention set up in their petitions, there is the suspicious fact that their petitions were presented to the chancery court by counsel for Mary Lee Benet, who herself offered the sole testimony in support of the contention alleged by Sharp, McBride and others, though she had for years previous thereto denied it, and we submit that under these circumstances there should be no holding that this discredited testimony of Mary Lee Benet should be a sufficient basis for a decree re-establishing the notes and deeds of trust when the chancery court by its decree of December 22, 1910, had distinctly declared that there had been no delivery of the notes, and, consequently, that the same constituted no lien upon her interest in the Ford trust estate.

"Second. Your petitoners further respectfully submit that under the circumstances developed in these causes there had been no sufficient delivery of the notes to give Sharp, McBride and others any vested rights in the premises.

"It appears that the notes had been executed by Mary Lee Benet and held by her in her possession until June 11, 1898; that on that day she delivered the notes to her own counsel, Edgar Allan, Sr.; that these notes were to be held by him until such time as the same could be collected, either through a sale of the property under the deed of trust, or by payment through decree of the court; that after such a

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collection he was, under the provisions of the paper marked 'X' and hereinbefore referred to, to apply the proceeds as therein directed. The chancery court held that these facts constituted an equitable assignment or an irrevocable appropriation, which amounts to an equitable assignment, by Mary Lee Benet to Sharp, McBride and others. This conclusion of the chancery court, we submit, is contrary to the uniform current of authority and should not be sustained.

"Third. It will be observed that there was no authority in the paper marked 'X', above referred to, nor otherwise shown to exist in the record, empowering Sharp, McBride and others, or either of them, to collect the amount of the notes involved in this procedure. Edgar Allan, Sr., the attorney of Mary Lee Benet, was alone authorized to collect the proceeds of the notes when collected. Whether or not Edgar Allan, Sr., carried out those directions was a matter purely between him and his client, Mary Lee Benet. Sharp, McBride and others had no notice of the execution of the notes or of their possession by Edgar Allan, Sr. As between the trustee and Edgar Allan, Sr., Edgar Allan, Sr., stood in the position of beneficiary. Sharp, McBride and others then had no such interest as rendered it necessary to make them parties to the proceeding for the release of the deed of trust. Edgar Allan, Jr., both in his capacity as trustee and as executor of his father's estate, was before the court, and under the circumstances it is submitted that they were the only necessary parties to that proceeding, and therefore the decree of December 22, 1910, was valid and binding and cannot now be assailed in this proceeding. See *Stout* v. *Stout*, 104 Va. 480, 51 S. E. 833.

"Fourth. But even if it were conceded that there was a delivery of the notes by handing them to Edgar Allan, Sr., the attorney of the drawer, and conceding further that the paper marked 'X' constituted an equitable assignment, giving to Sharp, McBride and others a vested right in the

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premises, and even if it were conceded that the decree of December 22, 1910, were a nullity, yet the fact is that Edgar Allan, Jr., the trustee, did cancel the notes and executed a deed of release in proper form and had the same admitted to record. Whether the decree of December 22, 1910, constituted a proper authority to the trustee to execute the deed of release or not, the fact remains that he did execute it. The effect of this deed of release was to convey to Mary Lee Benet the title which had been conveyed to him by the deed of trust of June 11, 1898. It was an actual conveyance. *Evans* v. *Roanoke Savings Bank,* 95 Va. 294, 28 S. E. 323, and *Williams* v. *Jackson,* 107 U. S. 478, 2 Sup. Ct. 814, 27 L. Ed. 529.

"The effect, then, of the execution of this deed of release by Edgar Allan, Jr., trustee, was to reconvey the property to Mrs. Benet. Upon its reconveyance your petitioners immediately acquired a vested legal lien upon the property."

These assignments of error will be considered in their order.

First. With respect to the first assignment of error.

This assignment of error raises the following questions for our decision:

a. Is this a case in which the rule laid down in the cases of *Copperthite* v. *Loudoun Nat'l Bank, Aragon Coffee Co.* v. *Rogers,* and *Kirby* v. *Talmadge* (cited in the first assignment of error), is applicable?

The rule referred to is stated in the case of *Copperthite* v. *Loudoun Nat'l Bank, supra,* as follows:

"When a defendant can, by his own testimony, throw light upon matters at issue necessary to his own defense and peculiarly within his own knowledge if the facts exist, and fails to go upon the witness stand, the presumption is raised and will be given effect to, that the facts do not exist."

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In the case at bar it does not appear that the facts in regard to the execution and delivery of the notes in question were peculiarly within the knowledge—or indeed, at all within the knowledge—of the appellees who failed to testify, or any of them. The sole matter within their knowledge was the consideration furnished by them, respectfully, for their debts. This was not peculiarly within their knowledge. It was equally within the knowledge of their debtor, Mrs. Benet, who by her answers in the cause and by her testimony admitted the validity of the consideration. There is no allegation in the pleadings of any collusion between appellees, or any of them, and Mrs. Benet to perpetrate a fraud. Further, the deed of trust and the notes (sec. 24 of the negotiable instrument statute of Virginia) were *prima facie* evidence of valuable consideration. No affirmative evidence whatever was introduced by appellants of any lack of such consideration. If the utmost effect were given to the conflict in the testimony with respect to Mrs. Benet having made prior statements in contradiction of her testimony, such contradiction would not have supplied appellants with any affirmative proof tending to show that such consideration was lacking. The *prima facie* case of valuable consideration made by the deed of trust and the notes themselves, is sufficient to support the decree complained of on the question of consideration.

This, therefore, is not a case in which the rule above referred to is applicable.

b. Was the circumstance that counsel for one of appellees in filing petition of latter, was also counsel for Mrs. Benet, the debtor, evidence of fraudulent collusion between appellees and Mrs. Benet?

The position taken in this assignment of error that *all* of the petitions of appellees were presented by counsel for Mrs. Benet, is not sustained by the record. Only the petition of Herndon's administrator was presented by the same

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attorney who was counsel for Mrs. Benet. However, this fact tends to support, rather than contradict, Mrs. Benet's testimony to the effect that she had always recognized the validity of the debts of appellees and their lien under said deed of trust and wanted the latter enforced. Certainly this in itself could not be considered as any proof of fraudulent collusion between Mrs. Benet and appellees, and especially is this true in the absence of any charge of fraud in the pleadings.

c. In reference to the delay of appellees referred to, it is deemed sufficient to say:

Ten years of the delay by appellees in asserting their debts is explained by the fact that they could not assert them until Mrs. Ford's death in 1908. The record shows that they have been guilty of no unreasonable delay since that time.

We, therefore, cannot sustain the first assignment of error.

Second. With respect to the second assignment of error.

Counsel for appellants cite a number of authorities bearing upon their position taken in this assignment of error, to the effect that there was no such delivery of the notes in question to or for the benefit of appellees as to negotiate them and set them afloat as existing debts.

In the view we take of this case, however, it is not necessary for us to discuss these authorities or to consider such question. The action of appellees was not upon the notes, but to enforce the deed of trust. The deed of trust was unquestionably delivered by Mrs. Benet to the trustee and by him duly recorded before the lien of any of the judgments of appellants came into existence. The deed of trust secured the payment of the debts in question. It is true the trust deed states that such debts are evidenced by the notes as described therein. But upon suit to enforce the deed of trust, the delivery or non-delivery of the notes becomes an

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immaterial question. The deed of trust is in itself sufficient evidence of the existence of the debts, in the absence of any proof of their payment subsequently to its delivery.

As said by this court in the case of *Eacho* v. *Cosby*, 26 Gratt. (67 Va.) 112, Staples, J., delivering the opinion of the court: "But the question of delivery is only important where the action is upon the note, or it is sought to charge one who is only liable by reason of being a party to the instrument. When a debt exists independent of the note, the action is often upon the original consideration. * * * If in such a case the debtor executes a deed of trust or mortgage to secure the deed, and in the deed refers to the note, it will scarcely be maintained that the deed is a nullity because there is a failure fraudulently or negligently to execute and deliver the note. The true inquiry is, does the debt exist? Is it due? When this is satisfactorily ascertained, the form of the security is important so far, only, as it affects the remedy. It is not essential that there shall be any bond or note whatever. The deed of trust or mortgage will be valid without any other evidence of the debt than its recitals."

Therefore, we cannot sustain the second assignment of error.

Third. With respect to the third assignment of error.

It is true that the deed of trust of record gave no notice that any of appellees was a beneficiary thereunder, except McBride. It did give express notice that he was such beneficiary at the time of the execution of the deed of trust to the extent of the note payable to him or order. The other two notes in question were, as described in the deed of trust, in effect payable to the holder or holders thereof, that is, to bearer. The deed of trust, as it appeared of record, did itself, therefore, furnish *prima facie* evidence, and hence it gave notice, that it secured the payment of

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valid subsisting debts to the amount of those in question, in favor of the holder or holders of the notes. Hence, no decree of court directing the release of such deed of trust could be valid unless based upon some pleadings putting in issue before the court whether there was or were any holder or holders of such notes. The existence of an issue in a cause is essential to the exercise of the jurisdiction of the court. There must be some proceeding by which the issue between the parties in interest is presented to the court for decision, and, moreover, all such parties must be given an opportunity to be heard thereon. *Linkous* v. *Stevens*, 116 Va. 905-911, 83 S. E. 417; Black on Judgments, pp. 907-8; *Graham* v. *LaCrosse Ry. Co.*, 3 Wall. 704, 709-10, 18 L. Ed. 247. Aside from the question as to the necessary parties to such a proceeding, appellants are confronted with the fatal defect in their case that there was no such proceeding at all. There was no pleading tendering such issue. The special commissioners' report was merely *ex parte*. It could in no sense be regarded as a proper pleading to put the necessary question of fact in issue. The decree was therefore void.

Further:

The special commissioners' report referred to paper "X," It was filed in suits, the papers and proceedings of which gave information of the contents of paper "X" and information of what the report of Commissioner Guy showed as to who were the real beneficiaries of the debts in question. Moreover, such papers and proceedings showed the allegations of the petition of the executor and executrix of Edgar Allan, Sr., that such debts were subsisting debts and that the lien of such deed of trust should be enforced. Upon such disclosure of facts shown by the record of such suits, clearly appellants were all necessary parties to any proceeding seeking to obtain a decree of court therein affecting

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the release of the lien of the deed of trust. *Moorman* v. *Arthur*, 90 Va. 455, 473, 18 S. E. 869; *Simon* v. *Ellison*, 90 Va. 157-8, 17 S. E. 836; 1 Barton's Ch. Pr., p. 232. None of them having been made such parties or having any notice of such decree before it was entered, the decree was void for this reason also.

Hence, this assignment of error cannot be sustained.

Fourth. With respect to this assignment of error. If the trustee had released the deed of trust in question by a deed of release, with nothing on the face of it to put the appellants upon inquiry as to his lack of authority to do so, the position taken in this assignment of error might be tenable, and the remedy of appellees might be solely by proceeding against the trustee for breach of trust.

As to the cases cited by counsel for appellants on this point: The case of *Evans* v. *Roanoke Savings Bank*, 95 Va. 294, 28 S. E. 323, involved a release on the margin of the deed book regular in form and in compliance with the statute, as it then existed, on the subject; and that of *Williams* v. *Jackson*, 107 U. S. 478, 2 Sup. Ct. 814, 27 L. Ed. 529, involved a release deed regular in its form, in which the payee of the note evidencing the debt secured by the deed of trust, united with the trustee in the deed of release.

In the case at bar the release deed was not regular in form; it shows on its face that the trustee did not act of his own volition, but under decree of court, which decree is referred to. The release deed further refers to the *ex parte* special commissioners' report aforesaid for the facts on which such decree was based. The release deed itself, of record, therefore, put every subsequent purchaser for value and creditor upon notice of what an examination of the papers and proceedings in said suits would have disclosed, namely, that the decree of December 22, 1910, was void, for the reasons stated in the discussion above of the third

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assignment of error, and that the release deed in question was a nullity. Therefore, the equities of appellants and appellees are not equal; the equities of the latter are superior to those of the former.

Hence, this assignment of error cannot be sustained.

For the foregoing reasons, we find no error in the decree complained of and it will be affirmed.

Affirmed.

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Syllabus.

Richmond.

CITY OF NORFOLK v. GRIFFIN BROTHERS.

March 15, 1917.

1. LICENSES—*Municipal Corporations—Taxation.*—The charter of the city of Norfolk provides that: "For the execution of its powers and duties the city council may raise annually by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the constitution and laws of this State and of the United States." Under this provision the municipality may tax other subjects than and in addition to those taxed by the State. It may also adopt a different method of laying the tax from that adopted by the State on the same subject—such as an *ad valorem* method instead of by license. But the city has not the power to divide a single taxable privilege, consisting of the right to conduct the business of a contractor, as classified and defined for the purpose of State taxation in the form of a State license, into several businesses so as to require several separate city licenses, one for each of the elements of right named in the city ordinance, which all accrue to the citizen under one State license.
2. LICENSES—*Power of Municipalities.*—When the legislature embodied in the charter of the city of Norfolk the limitation that its action under the clause of its charter above quoted should be in a manner "in accordance with the constitution and laws of this State and the United States," the charter in effect itself provided that the municipality should not in acting thereunder enact any ordinance of classification for purposes of taxation in conflict with a classification adopted by the laws of the State; for the inevitable result of such a conflict in enactment between the State and the municipality would be a violation of the uniformity in operation of laws sought to be attained by the provisions of the Fourteenth Amendment to the Constitution of the United States—which purpose, indeed, of attainment of uniformity so far as practicable, also underlies the provision of the State Constitution and laws on the subject of taxation.

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3. LICENSES—*Municipal Corporations—Construction of Powers.*—The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations.

Error to a judgment of the Circuit Court of the city of Norfolk, in a proceeding by the city against a contractor carrying on its business without a city license. Judgment for the defendant. The city assigns error.

Affirmed.

STATEMENT BY JUDGE SIMS.

This case arises under the following State license statute and license ordinance of the city of Norfolk.

The State license statute, so far as material, is as follows:

"Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet-iron, galvanized iron, metallic piping, tin, lead, electric wiring or other metal, or any other building material; or who shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or any composition, or who shall accept an order for or contract to excavate earth, rock, or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, shall be deemed a contractor. Every contractor shall, on the first day of May in each year, procure from the commissioner of the revenue for the city or district in which he has his office a license to carry on the business of a contractor; * * * provided, that no further license shall be required by the State for

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conducting said business in any part thereof; * * *" Code 1904, p. 2238, sec. 90.

The city of Norfolk license ordinance, so far as material, is as follows:

"59-A. Any person, firm or corporation, whether they have office in the city of Norfolk or not, accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, wall decorations, stone, brick, mortar, cement, wood, structural iron or steel, sheet-iron, galvanized iron, metallic piping, tin or any other building material or causing any work or labor to be done thereon or therein for which compensation is paid or received, shall for the privilege of transacting such business in the city of Norfolk pay a license tax to be ascertained in the following manner:

"General construction. For the privilege of doing the carpenter work and superintending the general construction of any building operation, shall pay a license tax to be ascertained in the following manner: If the gross amount of all orders or contracts accepted for the year prior to May 1, 1916, aggregates $15,000.00 or less, the said tax shall be $15.00, and a further license tax of fifty cents for each one thousand dollars or fractional part thereof in excess of fifteen thousand dollars. And any person other than the owner thereof who shall act as superintendent of the erection, construction or repairs of buildings for which a permit is required and which such work is not done under a regular licensed person, shall pay the license tax required in this section. The license, so far as applicable, shall be estimated from the records and books as shown by the building inspector for the year preceding. And the commissioner of the revenue shall consult the books of the building inspector before issuing a license under this section.

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"In the event that a contractor or builder is beginning business, the license tax shall be estimated upon the probable amount of all orders or contracts for the year succeeding May 1, 1916, and any person who shall make a business of erecting or constructing houses for the purpose of selling or renting the same, and shall not employ therefor a contractor or person who shall act as superintendent who has paid the license tax and given the bond required by law, shall pay a license tax as above provided for. No license required under this section shall be transferred or prorated.

"The inspector of buildings shall issue no permit unless the applicant shall have complied with the law requirng a license or bond, where either is required.

"And, in the event said person, firm or corporation taking out the license as above provided for engages, as an incident to said contract or order, in the prosecution of any of the trades hereinafter specifically mentioned and defined in the succeeding paragraphs of this section, instead of subletting the same, he shall, in addition to the above license, pay the specific license on said trades as hereinafter defined.

"It shall be the duty of every person, firm or corporation accepting orders or contracts as herein provided, who sublets any portion of the work so contracted for, to notify the commissioner of revenue of such sub-letting, giving the names and addresses of all persons, firms or corporations to whom any portion of the work is sub-let, and, upon failure so to do, the general contractor shall be presumed to be prosecuting the trades incident to said contract or order on his own account and liable for the specific license taxes thereon as hereinafter provided.

"1. Brick masons. Any person, firm or corporation shall, for the privilege of transacting the business of brick masonry, hollow title partition work, terra cotta or any other masonry work usually done by brick masons, pay a license

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tax of $35.00. No license required under this section shall be transferred or prorated.

"2. Plastering contractors. Any person, firm or corporation shall, for the privilege of transacting the business of erecting metal or wood laths, plastering, stucco work, or other work usually done by plasterers, pay a license tax of $25.00. No license required under this section shall be prorated or transferred.

"3. Roofing and sheet metal work. Any person, firm or corporation shall, for the privilege of furnishing or erecting metal, slate, tin, gravel or any other roofing, other than wood, including ornamental and sheet metal work, furnishing, repairing and installing hot air and latrobe heat, pay a license tax of $20.00. No license under this section shall be transferred or prorated.

"4. Cement and concrete work. Any person, firm or corporation shall, for the privilege of transacting the business of concrete and cement work, or the erection of building forms, or the installation of reinforcing steel for the same, pay a license tax of $50.00. No license required under this section shall be transferred or prorated.

"5. Painters and wall decorators. Any person, firm or corporation shall, for the privilege of doing painting, paper hanging or any other ornamental interior or exterior decorating, usually done by painters and decorators, pay a license tax of $20.00. No license required under this section shall be transferred or prorated.

"6. Stone masons. Any person, firm or corporation engaged in furnishing and erecting stone for any building operation shall pay for the privilege of doing such business in the city of Norfolk, a license tax of $25.00. No license required under this section shall be transferred or prorated.

"7. Any person, firm or corporation engaged in any other branch of the building trade not mentioned or provided for

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in this ordinance, shall pay a license tax of $50.00. No license required under this section shall be transferred or prorated.

FACTS OF THE CASE.

The material facts are as follows:

The defendants in error, defendants in the court below, hereinafter referred to as defendants, on July 7, 1916, accepted an order or contract for doing work on a building or structure in the city of Norfolk, which building or structure required the use of "paints, wall decorations, stone, brick, mortar, etc." On the same day, to-wit, July 7, 1916, the defendants applied to the commissioner of the revenue for the city of Norfolk and obtained from him a State license for accepting orders or contracts for doing work on or in any building or structure requiring the use of paint, etc., under the provisions of the State statute above quoted. At the same time the defendants applied to the same commissioner, the proper person authorized also to grant city licenses, for the same license from the city of Norfolk, which was not granted and could not be granted under the city ordinance above quoted, but the defendants were offered by said commissioner licenses under the provisions of said city ordinance necessary for them to carry out and perform their said order or contract, which the defendants refused to take out.

Thereupon, the defendants proceeded with and completed the said building or structure without any license from the city. By proceedings under other provisions of said ordinance, not necessary to quote, the defendants were charged in the police court with beginning the erection of said building without having a city license, contrary to said ordinance, which subjected them to a fine of $20.00 per day for each day of failure to pay said license taxes. The police justice dismissed the case with costs against the city. On

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appeal by the city to the circuit court thereof, the judgment of the police justice was affirmed, and the appeal was dismissed, with costs against the city. From the latter judgment the writ of error in this case was awarded.

George Pilcher and *W. M. Grant*, for the plaintiff in error.

Thomas W. Shelton and *Alfred Anderson*, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

This case involves the single question of the power of the city of Norfolk to divide a single taxable privilege, consisting of the right to conduct the business of a contractor, as classified and defined for the purpose of State taxation in the form of a State license, into several businesses so as to require several separate city licenses, one for each of the elements of right named in the city ordinance, which all accrue to the citizen under one State license.

In the case of *City of Richmond* v. *Richmond, &c. R. Co.*, 21 Gratt. (62 Va.), at p. 617, in the opinion of the majority of this court delivered by Judge Staples, in regard to the cities of the State, it is said:

"The authorities also establish that these corporations are mere auxiliaries of the government, established for the more effective administration of justice; and that the power of taxation confided to them is a delegated trust. In the exercise of this power they act as agencies to the State and not by virtue of any inherent authority. And whether the legislature may or may not utterly destroy this power of taxation in particular cases, still it must be exercised under the control and authority of the State. The manner of apportionment, the power of assessment and collection, the

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species of property which shall be the subject of taxation or exemption, are all matters purely within the legislative discretion, except where the Constitution ordains the rule."

In the case of *Ould, &c.* v. *City of Richmond,* 23 Gratt. (64 Va.), at p. 467, in the opinion of this court which was unanimous on this point (see *Humphreys* v. *Norfolk,* 25 Gratt. [66 Va.], at p. 99 for the point on which there was a division in the opinion of the court), it is said:

"The powers of public corporations are either express, implied or incidental. And except as to such powers as are incidental the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the State, to make laws or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant." Citing Cooley, 192.

This opinion then quotes from the charter of the city of Richmond a clause which, so far as material, is practically in the same words as the section of the charter of the city of Norfolk presently to be quoted, except that it refers in terms only to the laws of this State and of the United States, instead of to the Constitution and laws of this State and of the United States, and adds: "This clause confers the general power of taxation, except only as it may be limited *by the laws of the State* and of the United States." (Italics supplied.)

The city of Norfolk, in the instant case, relies on the following clause of its charter as conferring upon it the

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power to require the license taxes as provided for in its ordinance above quoted, namely:

"For the execution of its powers and duties the city council may raise annually by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the Constitution and laws of this State and of the United States."

We see, therefore, from this provision of the charter itself that the exercise of the general power of taxation delegated thereby by the legislature to the city of Norfolk may be limited by the laws of the State.

Now it is true, as counsel for the city of Norfolk contend, that such limitation, if it exists, must be by implication, *i. e.*, by necessarily implied intention on the part of the legislature. As said by this court in the case of *City of Norfolk* v. *Griffith-Powell Co.*, 102 Va., at p. 120, 45 S. E. 891, in reference to the very same clause of the charter of the city of Norfolk above quoted: "The legislature may, without doubt, at any time, impose such limitation upon the delegated powers of taxation as it sees fit; * * * by necessary implication in its general revenue laws or other enactment subsequent to its charter."

Does the State statute law above quoted, which classifies the business of a contractor such as is therein defined, as the subject of State license, taxation, limit the power of classification of the city under the clause of its charter above quoted to such State classification?

We think it does, by necessary implication.

It will be observed that this is not a question of power in the municipality to tax other subjects than and in addition to those taxed by the State. The city of Norfolk has that power under the clause of its charter above quoted. *City of Norfolk, &c.* v. *Norfolk Landmark, &c.*, 95 Va. 564, 28 S. E. 959. Nor is it a question of power to adopt a dif-

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ferent method of laying the tax from that adopted by the State on the same subject—such as an *ad valorem* method instead of by license. It has that power, as was held by this court in the cases of *City of Norfolk* v. *Griffith-Powell Co., supra; Newport News, &c. Co.* v. *Newport News,* 100 Va. 157, 40 S. E. 645; *Bradley* v. *Richmond,* 110 Va. 521, 66 S. E. 872. But this is a case involving the question of the power of the city of Norfolk to divide and make of one subject of taxation, as classified and defined by State law for State taxation, a number of subjects for the purpose of city taxation as numerous as it may choose, except as limited by an almost limitless number of kinds of work a contractor may have to do and of material he may have to use. This is a new and open question in this State and depends for its decision upon different considerations from those involved in the cases above cited in this paragraph.

The subject we are considering involves a question of the power of the city of Norfolk to tax an occupation, as the subject of taxation.

The State of Virginia has, by its revenue laws, classified and defined certain occupations for the purpose of State taxation by the license system; among them, by the statute above quoted, the occupation of a contractor. It requires but slight reflection to perceive how oppressive upon occupations would be the effect of allowing municipalities to enact ordinances classifying and defining occupations for purposes of city taxation different from the classification made by State laws on the subject. This would be to allow the auxiliary government, established for the more efficient administration of justice, without any inherent powers to make laws or adopt regulations of government, to make laws and adopt regulations in conflict with those of the State, its creator. This conflict would destroy the uniformity of the operation of the tax laws of the city as compared with those of the State in respect to the persons upon whom

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they are operative. So important is this subject and so fraught with danger of oppression that even the legislature is not without limitation upon its power of classification of occupations for purpose of taxation. The fourteenth amendment of the Constitution of the United States is held to apply to this subject, and it is held that, in the classifying of occupations and vocations by the legislature for the purpose of State taxation, this limitation upon its powers "requires the same methods to be applied impartially to all the constituents of the class which is subjected to taxation, so that the law shall operate equally and uniformly upon all persons in similar circumstances. * * * the *right to classify is not unlimited and unqualified* * * *" 4 Dillon Mun. Corp. (5th ed.), sec. 1409. (Italics are those of this author.) In a note to the section last quoted it is said: "*Classification for the purpose of taxation is subject to the rule of equality.* In *Santa Clara County* v. *Southern Pac. R. Co.* (C. C.), 18 Fed. 385, Mr. Justice Field said: 'The first section of the fourteenth amendment places a limit upon all the powers of the State, including among others that of taxation * * * Unequal taxation, so far as it can be prevented is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are and always will be more or less inequalities in the operation of all general legislation arising from the different conditions of persons, from their means, business or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result. * * * It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppression. * * * The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws."

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When the legislature embodied in the charter of the city of Norfolk the limitation that its action under the clause of its charter above quoted should be in a manner "in accordance with the Constitution and laws of this State and the United States," the charter in effect itself provided that the municipality should not in acting thereunder enact any ordinances of classification for purposes of taxation in conflict with a classification adopted by the laws of the State; for the inevitable result of such a conflict in enactment between the State and the municipality would be a violation of the uniformity in operation of laws sought to be attained by the provisions of the fourteenth amendment to the Constitution of the United States—which purpose, indeed, of attainment of uniformity so far as practicable, also underlies the provisions of our State Constitution and laws on the subject of taxation. It is true that, but for said limitation in its charter, the inquiry with respect to uniformity of operation of its ordinances would be confined in its scope to the corporate limits of the city of Norfolk, and if such operation was uniform within those limits there would be no violation of the rule of uniformity referred to. But, with such limitation in its charter, it is plain that the legislature meant to make State boundary lines the limits of the scope of the inquiry as to the uniformity of the operation of such ordinances upon the subjects of taxation with respect to which the State has adopted a classification.

While, therefore, a conflict of the ordinance of the city of Norfolk with the State statute in such case, producing lack of uniformity in the operation of State and municipal laws, would not be a violation of the fourteenth amendment of the Federal Constitution, it would be a violation of its spirit, and a direct violation of the said limitation in the charter of the city itself.

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We are not unmindful of the fact that the decisions of this court above mentioned of *City of Norfolk* v. *Griffith-Powell Co., Newport News, &c. Co.* v. *Newport News,* and *Bradley* v. *Richmond,* impinge in principle to some extent upon the conclusions expressed above, inasmuch as the difference in method of laying taxation thereby allowed to the municipalities of the State having such clause in their charter as that contained in the charter of the city of Norfolk, in some degree results in lack of uniformity in the burdens of taxation resting upon the citizens of the State. But the harmful results under consideration are not comparable to those which would arise from a difference in the classification of occupations as subjects of taxation, as aforesaid; and while we do not mean to impair the authority of the cases referred to as applicable to their allowance of a different method being adopted by a city from that of the State in the laying of taxes, we are unwilling to extend the doctrine of such cases to the classification of occupations as a subject of taxation.

Further, the rule is that the powers of the municipality are more strictly construed in respect to its taxation of occupations.

As said by Cooley on Taxation (3d ed.), p. 1101:

"*Construction of municipal powers.* The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations."

Further: We find the following specifically laid down and held by the following authorities:

"* * * a city cannot divide a single taxable privilege and require a separate license for each of the elements of right that accrue to citizens thereunder." Cooley on Taxation (3d ed.), p. 1103. Citing *Ex Parte Sims,* 40 Fla. 432, 25 So. 280, and *Canova* v. *Williams,* 41 Fla. 509, 27 So. 30.

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The State revenue laws of the State of Florida, in imposing license taxes upon dealers in liquors grouped the various intoxicants therein designated as spirituous, vinous and malt liquors into one general class of merchandise, and provided that a dealer in any one or all of such several intoxicants should be subject to one State license tax. The city of Jacksonville acted under the special authority of its charter to "license and tax privileges," and under the power conferred upon municipalities generally by the general revenue laws of the State to "impose taxes on any business, profession or occupation not mentioned" in the general revenue acts. And the court held in the case of *Ex Parte Sims, supra,* that the city of Jacksonville had no power to adopt an ordinance requiring two city licenses of dealers in liquors, one license to sell spirituous and vinous liquors either at wholesale or retail, and malt liquors at retail, and another license to sell malt liquors at wholesale. The court in that case said (italics below are those of the court in such opinion):

"The real inquiry, upon whose solution the ordinance must stand or fall, is this: Can the city of Jacksonville by ordinance, under the delegated general power to tax, segregate the several elements of right that accrue to the citizens under one *taxable privilege,* as recognized, defined and declared by the general statute law of the State, and tax each of such *elements* as a *separate* and *distinct* privilege of its own creation? * * *

"We are not now called upon to determine the extent of the city's power to fix the *amount* of licenses, or to create, classify or graduate licenses upon those occupations not specifically taxed by the State * * *

"When, as in this ordinance, the city undertakes to curtail the privilege by constructing out of its constituent elements two taxable privileges * * * it has transcended

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the authority delegated to it, and the provisions of such ordinance imposing such special tax upon the one element of the privilege are unauthorized and void, being inconsistent with and in conflict with the general provisions of law, and not authorized by its charter act. * * *

"The general rule is that statutes conferring authority to impose taxes must be construed strictly. *Moseley, Governor, &c.* v. *Tift,* 4 Fla. 402. Another general rule universally recognized is that delegated corporate powers to municipalities, particularly grants of power that are out of the usual range and that may result in public burdens, or which in their exercise touch the right of liberty or property, or any common law right of the citizen, must be strictly construed, and when in such construction there is any ambiguity or doubt as to the extent of the power, it is to be determined in favor of the State, or general public, and against the State's grantee. I Dillon's Mun. Corp., secs. 89-91; *Ex Parte Mayor of Florence in re Jones,* 78 Ala. 419; *City of Canton* v. *Nist,* 9 Ohio St. 439; *Kniper* v. *City of Louisville,* 7 Bush. (Ky.), 599; *City of Brenham* v. *Brenham Water Co.,* 67 Tex. 542, 4 S. W. 143; *Hanger* v. *City of Des Moines,* 52 Iowa 193, 2 N. W. 1105, 35 Am. Rep. 266; *City of Corvallis* v. *Carlile,* 10 Oregon 139, 45 Am. Rep. 134; *Mintburn* v. *Larue,* 23 How. (U. S.) 435, 16 L. Ed. 574; *Williams* v. *Davidson,* 43 Tex. 1; *Kirkham* v. *Russell,* 76 Va. 956."

The case of *Canova* v. *Williams, supra,* is to the same effect.

In the case of *Hotelling* v. *City of Chicago,* 66 Ill. App. 289, it was held that a city organized under the general law has power to license secondhand stores, but cannot require a separate license for each article in which such store deals. The court in this case said:

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"The city has authority to license secondhand stores, but may not require one license for dealing in secondhand shoes, another for each separate article of clothing, furniture, etc., in which secondhand stores deal."

"The absurdity of the logical result, if it be held that separate licenses for every article may be required, is conclusive against the power."

For the foregoing reasons we find no error in the judment complained of, and it will be affirmed.

Affirmed.

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Richmond.

NORFOLK AND WESTERN RAILWAY COMPANY v. TUCKER'S ADMINISTRATRIX.

March 15, 1917.

1. MASTER AND SERVANT—*Federal Employers' Liability Act—Assumption of Risk.*—In an action by a servant's administratrix against his master, alleging that the servant's death was caused by the master's negligence, the declaration contained two counts, one setting out a cause of action under the laws of this State, and the other a cause of action under the Federal employers' liability act. The trial court required the plaintiff to elect upon which count she would proceed. As she chose to proceed under the latter, the defense of assumed risk was open to the master.
2. MASTER AND SERVANT—*Assumption of Risk—Safe Place to Work.*—A sand shoveler, an experienced workman, was killed by the falling of a clod of mixed clay and sand near the top of the bank beneath which he was working. It was a common thing in the course of work for clods to project from the face of the bank. If the men thought them likely to fall, they pried them down. If not, they let them alone. But they knew there was a certain amount of risk in the latter course, and they themselves were the sole judges of the cases in which they should take the risk.

   Held: That the accident resulted from a risk which was inherent in the employment and was perfectly well understood by the decedent and assumed by him.

Error to a judgment of the Circuit Court of Prince George county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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W. B. McIlwaine and *J. M. Townsend,* for the plaintiff in error.

Paul Pettit, for the defendant in error.

KELLY, J., delivered the opinion of the court.

Rufus Tucker was killed while at work for the Norfolk and Western Railway Company. In an action alleging that his death was caused by the company's negligence, his administratrix recovered the judgment under review.

The very simple work in which Tucker and other employes were engaged, consisted in cutting down a sand bank and loading the sand therefrom, by the use of wheelbarrows, into railroad cars. The sand bank was fifteen or twenty feet high. It was being operated by a number of men under the general charge and direction of a railroad section foreman, who visited the operation at more or less frequent intervals varying from once a day to two or three times a week. Another employee, doing the same work and receiving the same pay as Tucker and the other laborers there, was also the time-keeper and leader or local boss or foreman of the force.

The top of the bank is covered with clay or earth, and below this is the sand. To get the sand from the bank, the men go to the top and pry it off with crow-bars, thus causing the clay and earth and sand to "cave," or break away, and roll down to the foot of the bank. This process leaves the face of the bank at the top nearly perpendicular for several feet, sloping off thence with a considerable incline to the bottom, where the sand is shovelled into wheelbarows and thence conveyed along a plank runway to the cars. Some fifty or more men were thus employed, but they worked in small squads at intervals of a few feet from

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made a sort of dent or scallop in the bank, thereby to a certain extent giving to each a separate working place, which was still further defined by the more or less cloddy clay and earth which the men discarded and threw to one side or the other as the several squads loaded the sand into their wheelbarrows.

A few days prior to the accident complained of, the top of the bank over one of these scallops had been pried off, and a clod of mixed clay and sand was left sticking on or in the face of the bank about four feet from the top. This clod did not present a dangerous appearance, and for that reason as well as because enough of the bank was already down to answer for the time being the purpose of the operation, it was left undisturbed for several days while a squad of hands, including Tucker, continued to load sand in the working place below it. This condition or situation was one which from the nature of the work was liable to arise at any time, and had frequently arisen in the previous course of the enterprise. After some days, but before the sand previously thrown down had all been loaded, the clod fell from the bank, breaking as it fell, and a piece of it struck Tucker, causing the injuries which are alleged to have resulted in his death.

There is some conflict in the evidence as to whether the clod projected from the bank, but none whatever as to the fact that it was plainly visible to the men below, and that none of them thought it was likely to fall. Tucker had worked for the defendant company for a number of years in this same employment, and was thoroughly familiar with the manner in which the operation was carried on. Being in point of service one of the oldest employees on the job, he was accustomed to "caving" the bank himself, the oldest hands generally being called on for that purpose. It was a part of the business of these men, known and recognized

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by all of them, to look out and care for the safety of themselves and of each other, and to pry down the bank, as they did do, whenever it seemed to them dangerous, whether they needed to pry it down for more sand or not. This duty rested no more upon the leader or foreman above mentioned than it did upon each and every member of the force, and it was a duty which, in the absence of any understanding with the company to the contrary, would, in view of the character of the work, have rested upon them as a matter of law from the implied contract on the part of the workmen; but it was also expressly brought to their attention and recognized by them, as affirmatively appears from the evidence. The plaintiff's decedent, Rufus Tucker, had been frequently charged with it during the course of his long employment with the defendant company in this branch of service.

There were two counts in the declaration, one setting out a cause of action under the laws of this State, and the other a cause of action under the Federal employers' liability act. The trial court, upon the motion of the defendant, required the plaintiff to elect upon which count she would proceed, and she chose the latter, so that the doctrine of assumed risk is fully open to the railway company as a defense. *Southern Ry Co.* v. *Jacobs*, 116 Va. 189, 81 S. E. 99.

The only negligence charged in the declaration was the failure of the defendant "to use due and proper care to provide for said plaintiff's intestate and for its other employees a safe place for them to work in, and particularly * * * to use due and proper care to keep and maintain the walls and sides of its said sand pits and banks * * * clear of such rock and dirt as were liable to fall down and injure or kill" those employed at work in the bank.

All of the several assignments of error were waived at the hearing in this court except one based on the action of

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the court in overruling the motion to set aside the verdict of the jury as contrary to the law and the evidence.

The motion should have been sustained. There is, as we conceive, no aspect of the case as disclosed by the evidence in which the verdict could be upheld. The accident resulted from a risk which was inherent in the employment and was perfectly well understood by the plaintiff's decedent. It was a common thing in the course of the work for clods to project from the face of the bank. If the men thought them likely to fall, they pried them down. If not, they let them alone. Of course they knew there was a certain amount of risk in the latter course, and they themselves were the sole judges of the cases in which they should take the risk. Prying the clods down or leaving them in place were the merest incidents of the work which they were employed to do. The principles of law exempting the master from liability under the facts of this case are too well settled to call for any discussion of them. They are fully discussed in many of the cases decided by this court, among them being *Jacoby Co.* v. *Williams,* 110 Va. 55, 65 S. E. 491, and *Fields* v. *Virginian Ry. Co.,* 114 Va. 558, 77 S. E. 501.

The judgment complained of must be reversed, and the cause remanded to the circuit court for a new trial to be had, if the plaintiff shall be so advised, in conformity with the views expressed in this opinion.

Reversed.

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Syllabus.

Richmond.

CITY OF RICHMOND v. MAYO LAND AND BRIDGE COMPANY.

March 15, 1917.

1. EMINENT DOMAIN—*Burden of Proof.*—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old bridge with its approaches as a location for the new bridge.

   Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it.

2. DEDICATION—*Proof.*—Where a city seeks to show the dedication of an approach to a bridge clear proof of such dedication is required.

3. DEDICATION—*Bridge Company—Approaches to Bridge.*—A city sought to show a dedication to the public of an approach to a bridge owned by a public service corporation. The approach in question was indispensable to the use of the bridge and the company's control of it was essential to the discharge of its duty to the public. Therefore, the company could not expressly have dedicated the approach unqualifiedly to the city, because such dedication would have been in derogation of its charter obligation to the community at large and *ultra vires* and not binding upon the corporation. If this be so with respect to an express dedication, *a fortiori* must it be true of a dedication sought to be established by implication merely.

4. DEDICATION—*Validity.*—The lawfulness of a dedication, like the constitutionality of a law, must depend not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication. Therefore, where a city has power under its charter to close its streets, a public service bridge company can not dedicate to the public as a street the approaches to its bridge.

5. BRIDGES—*Approaches—Alienation.*—The approach to a bridge, being an essential and inseparable part of it, can not be dissevered, since that would deprive the public service corporation of the means of performing a non-delegable duty which it owes to the public.

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Error to a judgment of the Hustings Court of the city of Richmond, in a condemnation proceeding. The city assigns error. The defendant assigns cross-errors.

Affirmed.

The opinion states the case.

H. R. Pollard, for the plaintiff in error.

C. V. Meredith, Cutchins & Cutchins and *R. W. Meredith,* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

By authority of an act of the General Assembly, approved March 15, 1906, the city of Manchester was annexed to and became part of the city of Richmond, Acts 1906, p. 370. By ordinance approved March 5, 1910, it was provided that the consolidated municipality should construct and maintain a modern up-to-date bridge across James river, either on the site of Mayo's bridge or so near thereto as to afford direct communication betwen Hull street in the city of Manchester and Fourteenth street in the city of Richmond. Accordingly proceedings were instituted in the hustings court on behalf of the city against the Mayo Land and Bridge Company, owners of Mayo's bridge, to condemn the old bridge and site as a location for the new bridge.

It was conceded that the Mayo Land and Bridge Company owned the old bridge and the strip of land across James river on which it was erected; but difference having arisen between the parties touching the company's alleged ownership of the approaches to the bridge, it was agreed that the commissioners should separately appraise the main structure and site and the northern and southern ap-

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proaches, respectively. Thereupon the appraisers reported, (1) that $112,000 would be just compensation for the bridge and site, including a brick building adjoining the dock at the northern terminus; (2) that $5,500 would be just compensation for the strip of land lying on the north side of the river between the terminus claimed by the city as Fourteenth street and that to which the defendant company asserted title; and (3) that $2,500 would be just compensation for the strip on the south side between the terminus claimed by the city as Hull street and that claimed by the defendant.

The city paid into court the $112,000 which was accepted by the defendant company and is not involved in this controversy.

At the hearing, the hustings court confirmed the report of the commissioners with respect to the $5,500 assessment, but overruled their finding of $2,500 for the southern approach to the bridge. A writ of error and supersedeas was awarded the city to the order allowing the former assessment, while the defendant in error assigned cross-error to the disallowance of the $2,500. We shall consider these assignments in reverse order.

1. His Honor, Judge Richardson, in a written opinion, disposed of the question involved in the cross-assignment as follows:

"As to the strip of land on the south side of the river heretofore mentioned and claimed by the Mayo Land and Bridge Company as its property, there is no competent evidence in this record to show that the said Mayo Land and Bridge Company, or their predecessors in title ever owned the said strip of land, and I am further of opinion and do decide that the said strip of land is, and has been for more than a century, a public street of the city of Manchester * * * and that the Mayo Land and Bridge Company is not entitled to compensation for the same."

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The record sustains that conclusion, which is strengthened by reference to the case of *Mayo* v. *Merchie*, 3 Munf. (17 Va.) 358. From the latter case it appears that when Colonel William Byrd founded the "town of Manchester, by way of lottery," the agents appointed by him to superintend the laying off and bounding of the town, expressly set apart "the slip of land which lies between James river and the lots of the said town, near what is now called Mayo's bridge, as part of the said town, to be annexed thereto, and held by the inhabitants thereof, as a common, forever." Conformably to that plan the property was conveyed by Colonel Byrd to trustees for the town. It also appears that John Mayo subsequently obtained from Colonel Byrd, for "a trifling consideration," a deed, without warranty, conveying to himself the above mentioned "slip." The appellate court declared the latter deed inoperative to pass title to the "slip," but modified the decree of the Superior Court of Chancery for the Richmond district, so as to exclude from its operation ten feet of land between the river and canal belonging to Mayo.

The burden of proof rested upon the defendant in error to show title to the southern approach to the bridge, and we are of opinion that the evidence is insufficient for that purpose.

2. This brings us to the consideration of the remaining question: The action of the hustings court sustaining the title of the Mayo Land and Bridge Company to the approach to the bridge on the north side of James river, and directing the city of Richmond to deposit to the credit of the cause $5,500, with interest, the amount ascertained by the appraisers to be just compensation therefor.

This issue is greatly simplified by the following stipulation of counsel:

"It is agreed that the city of Richmond recognizes the original ownership of the Mayos in the strip of land begin-

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ning about 778 feet north of the canal connecting the basin and the dock, spoken of on some of the maps as the dock or canal; that the abutment or causeway began about this point and included the abutment or causeway of the bridge at the foot of Fourteenth street crossing this canal, which abutment and approach or causeway were the property of the Mayos, and a part of the approach, abutment or causeway of the bridge proper; that from this point to the northern end of Mayo's bridge proper, the land, trestles, causeway and retaining walls were at one time built by the owners of Mayo's bridge, and the trestle changed to a causeway as the land was filled up, either artificially or by natural accretions; and that this original approach or causeway is now the strip of land extending from the northern side of the canal down to the Mayo bridge proper at the present margin of the river; and that originally Fourteenth street stopped just north of the canal over which there is now and always has been a small bridge, owned by the Mayos at one time. The city recognizes the original ownership of the Mayos in the said strip of land and makes no claim to same by express dedication of the same by deed or grant; but relies upon an implied statutory dedication of said strip of land, causeway or approach, and upon sundry actions of the council of the city of Richmond in treating the land in controversy as a public street and as an acceptance of the same and upon alleged recognition by the Mayo Land and Bridge Company of the implied or statutory dedication and the alleged acceptance as aforesaid. This agreement applies only to the northern abutment of Mayo's bridge."

The opinion of the learned judge of the hustings court contains an excellent discussion of the evidence bearing upon the alleged implied statutory dedication by the Mayo Land and Bridge Company of its northern approach to the bridge to the city of Richmond for a public street; and we agree with him that the city has not maintained that con-

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tention with the clear proof required of those claiming such dedication, but that the weight of evidence was the other way. *City of Norfolk* v. *Southern Ry. Co. et als*, 117 Va. 101, 83 S. E. 1085.

There is another view of the question, however, which renders it unnecessary to pursue that inquiry in detail. The Mayo Land and Bridge Company is a public service corporation, and the approach in question is indispensable to the use of the bridge and the company's control of it is essential to the discharge of its duty to the public. Therefore, the company could not expressly have dedicated the approach unqualifiedly to the city, because such dedication would have been in derogation of its charter obligation to the community at large and *ultra vires* and not binding upon the corporation. If this be so with respect to an express dedication, *a fortiori* must it be true of a dedication sought to be established by implication merely.

The city has power under its charter to close its streets and alleys (City Code, 1910, charter sec. 19-g), and the lawfulness of a dedication, like the constitutionality of a law, must depend not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication.

In *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71, 25 L. Ed. 950, 953, it was held: "The franchises and powers granted to such corporations (public service corporations organized under legislative charters) are, in a large measure, designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself to perform these duties to the public, or attempts to absolve it from their obligation without the consent of the State, is a violation of its contract with the State and is forbidden by public policy, and is, therefore, void."

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The head notes to the case were prepared by Mr. Justice Miller, who delivered the opinion of the court. At page 953, he quotes with approval from the opinion of Chancellor Zabriskie in *Black* v. *Canal Co.*, 22 N. J. Eq. 130, 133, as follows: "It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." Justice Miller observes: "For this he cites some ten or twelve decided cases in England and in this country."

In elucidation of the principle, the chancellor, at p. 399, says: "The principle is that where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions * * * is a violation of the contract with the State, and is void as against public policy."

A leading case on the subject is *Northern Pacific R. Co.* v. *Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157-8.

The authorities sustain the proposition that the approach to a bridge, being an essential and inseparable part of it, cannot be dissevered, since that would deprive the public service corporation of the means of performing a nondelegable duty which it owes to the public. *Pittsburg, &c. R. Co.* v. *Dodd*, 115 Ky. 175, 210-11, 72 S. W. 822, 74 S. W. 1096; 3 Dillon on Mun. Corp., sec. 1678, note 1; Clark on Corp. (Hornbook Ser.), sec. 68, cases cited in note 73; *Hast* v. *Railroad Co.*, 52 W. Va. 396, 402, 44 S. E. 155.

For these reasons we are of opinion that the decision of the hustings court upon both assignments of error is right and should be affirmed.

Affirmed.

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Syllabus.

Richmond.

CITY OF RICHMOND V. MCCORMACK.

March 15, 1917.

1. AMENDMENTS—*Statute of Jeofails—Pollard's Code 1904 (section 3449).*—Where a declaration contains a defective statement of a good cause of action, this is the class of error that the statute of jeofails is designed to cure.
2. PLEADING—*Legal Conclusions.*—An allegation of duty is only a conclusion of law; and, where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause, the declaration ought to be sustained.
3. JUDGMENT—*Arrest of Judgment.*—In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. The allegation of duty was mere surplusage, and under the provisions of sections 3246, 3449 and 3272, Code 1904, directing the court to disregard formal defects in pleading, it was no ground for a motion in arrest of judgment.
4. PLEADING—*Waiver of Defects.*—Where defendant pleads the general issue and goes to trial upon the merits, he thereby waives technical defects in the declaration.
5. PLEADING—*Cure of Defects—Streets and Sidewalks—Duty of City.*—In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. If by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted and the instructions of the court, which clearly and accurately defined the duty of the city to be "to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exer-

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cising reasonable and ordinary care to avoid injury and danger while using the same."

6. INSTRUCTIONS—*Refusal of Instruction Covered by One Given.*—It is harmless error, if any, to refuse an instruction where another instruction given substantially embodies the same proposition of law as that contained in the instruction refused.

7. INSTRUCTIONS—*Refusal of Instruction Covered by One Given.*—Defendant in an action against the city for damages for personal injury caused by an obstruction on a sidewalk, asked the court to instruct the jury that if the plaintiff traveled on the sidewalk at the point in question after dark, knowing of the defect or obstruction in the street complained of, he was bound to use ordinary care commensurate with the danger of which he had knowledge, taking into consideration the fact of darkness, and was required to exercise more caution in such case than if he was ignorant of the defect or obstruction and it was daylight. And if the jury believe from the evidence that the plaintiff failed to exercise such care and caution as the fact of such knowledge and of the darkness and other circumstances shown by the evidence would reasonably require of an ordinarily prudent man, he was guilty of contributory negligence. The refusal of this instruction was held not to be reversible error, where another instruction given by the court embodied precisely the same proposition of law without emphasizing the darkness, but instructed the jury that the plaintiff was required to exercise such ordinary care and caution in passing or avoiding the obstruction complained of as knowledge of its existence and the other circumstances of the case shown by the evidence would reasonably require of an ordinarily prudent person. This, in effect, tells the jury that they should consider the darkness as well as all the other facts shown by the evidence. Among these other facts were the rain which was falling and the wind which was blowing at the time of the accident, as well as the street lights and the shadows, if any.

8. INSTRUCTIONS—*Refusal of Instruction Covered by One Given—Multiplication of Instructions.*—It was not error to refuse an instruction where the court had already given the jury eight instructions, covering two pages and a half of the printed record, which instructions sufficiently covered every phase of the case. A multiplication of instructions tends to confuse and not to aid the jury.

9. INSTRUCTIONS—*Want of Evidence on Which to Base It.*—It is

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not error to refuse an instruction where there is no evidence upon which it could properly be based.

10. STREETS AND HIGHWAYS—*Accidents.*—The general rule is that a traveler has a right to assume that a street is in a reasonably safe condition.

11. STREETS AND HIGHWAYS—*Negligence of City.*—In an action against a city for personal injuries sustained by reason of tripping over the exposed root of a tree in a sidewalk, the negligence of the city is plainly manifested where the plaintiff's evidence shows that the obstruction was not simply a root over which one might stumble, but was a root fully exposed with branches, one root above another, rising about eight inches above the level of the sidewalk, with an opening like a horseshoe, in which a pedestrian's foot might be caught.

12. APPEAL AND ERROR—*Contributory Negligence.*—Where the question of contributory negligence was properly submitted to the jury under well-established principles, a mere doubt as to whether the jury decided the question properly is plainly insufficient to justify a reversal of the judgment.

Error to a judgment of the Hustings Court, Part II., of the city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

H. R. Pollard, for the plaintiff in error.

L. O. Wendenburg and *T. Gray Haddon,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This is an action for damages for personal injury, growing out of a fall of J. T. McCormack, caused by his tripping over and having his feet entangled in the exposed roots of a tree in the sidewalk on Cary street, in the city

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of Richmond, in which there was a verdict and judgment for the plaintiff.

1. The refusal of the court to sustain a motion of the plaintiff in error in arrest of judgment, is assigned as error. The ground of this motion is that the declaration alleged that it was the duty of the city to keep its streets sound, safe and suitable for public use and travel, and particularly the sidewalk of the street known as Cary street. The point made is that the city owed no such duty as that alleged, but that it fulfilled its duty when it had made its streets reasonably safe for those exercising reasonable care for their own protection.

There is no merit in this contention. The case comes strictly within the line of cases relied on by the plaintiff in error, namely, the declaration contained a defective statement of a good cause of action, and it is just this class of error that the statute of jeofails is designed to cure. *Roanoke Land & Imp. Co.* v. *Karn & Hickson,* 80 Va. 595.

In *Virginia, &c. Wheel Co.* v. *Harris,* 103 Va. 713, 49 S. E. 991, the rule is stated thus: "An allegation of duty is only a conclusion of law; and where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause, the declaration ought to be sustained."

Section 3246 of the Code provides that: "No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."

And section 3272 of the Code provides, that "On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judg-

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ment, according to law and the very right of the cause, cannot be given."

The allegation of duty, then, was mere surplusage, and if a demurrer had been interposed, the court would have overruled it, or possibly, to avoid controversy, the plaintiff would have amended the declaration. *Thomas* v. *Electrical Co.*, 54 W. Va. 398, 46 S. E. 217; Hogg's Plead. & Forms (2d ed.), p. 59; Andrews' Stephen's Plead. 411.

As above indicated, the statute of jeofails, Va. Code, sec. 3449, providing that "no judgment or decree shall be stayed or reversed * * * for any defect, imperfection or omission in the pleadings which could not be regarded on demurrer, or for any other defect, imperfection or omission which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of," is also conclusive.

In this case the defendant pleaded the general issue and went in trial upon the merits, and thereby waived any technical defect such as is now relied upon.

Again, if by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted, and the instructions of the court, which clearly and accurately defined the duty of the city thus: "* * * its duty is to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exercising reasonable and ordinary care to avoid injury and danger while using the same."

2. The pertinent facts of the case are, that the plaintiff, a man 71 years of age, was going along the south side of Cary street at about 8 o'clock p. m. on Christmas night, December 25, 1913, towards his wood yard, to catch mischievous boys who he thought would attempt to steal his

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wood to make bonfires; that when he reached the point opposite to where Lombardy street comes into Cary street from Main, he caught his foot in the root of a tree and was thrown to the ground, causing the injuries complained of. This root is described as coming from an elm tree about thirteen inches in diameter that stood on the outer edge of the sidewalk and had extending from it a root about six or seven inches in diameter at the tree, extending diagonally across the sidewalk, its height being about eleven or twelve inches above the surface of the walk at the tree and gradually diminishing in size until it disappeared in the ground at the fence on the inner side of the sidewalk; that this root had several branches; that he caught his foot in it and stumbled and fell over on his side, struck his stomach or bowels, injured his knee and hurt his side. The night was dark and rainy, and the wind was blowing at the time; that after the accident and up to the time he testified, October 28, 1914, he suffered a good deal of pain; that he sent for the doctor, and has had varicose veins and has been lame ever since.

Other errors assigned are the refusal of the court to give certain instructions:

(a) The defendant offered an instruction reading as follows:

"The court instructs the jury that a person using a street is bound to exercise his faculties in a reasonable manner to discover and avoid dangerous defects or obstructions in the way, and that the care thus required must be in proportion and commensurate with the danger, or appearance of danger. And if the jury believes from the evidence that the plaintiff in this case by the reasonable exercise of his faculties, could have discovered and avoided the defect or obstruction complained of, and that the accident or injury to the plaintiff occurred by reason of his failure so to exercise his faculties and his consequent failure to discover and

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avoid the defect or obstruction, then the court tells the jury that the plaintiff was guilty of contributory negligence and the jury must find for the defendant, the city of Richmond, even though the jury may believe from the evidence that the city was guilty of negligence and that the sidewalk was not in a reasonably safe condition."

The court refused to give this instruction, but in lieu thereof gave instruction marked "No. 4," reading as follows:

"The court instructs the jury that a person using a public street is required to use ordinary care and to exercise his faculties in a reasonable manner to avoid injury to himself, and the care thus required must be commensurate with the conditions by which he is surrounded. And if the jury believe from the evidence that the injury to the plaintiff occurred or was contributed to by reason of his failure to use ordinary care or to make reasonable use of his faculties, then he was guilty of contributory negligence and the jury must find for the defendant, the city of Richmond, even though they may believe from the evidence that the city was guilty of negligence and that the sidewalk was not in a reasonably safe condition."

Probably the instruction was refused because it was thought to be misleading to the jury to instruct it that it was the duty of a traveler upon a highway to use ordinary care to discover and avoid dangerous defects or obstructions, whereas the general rule is that he has the right to assume that the street is in a reasonably safe condition. *Bedford City* v. *Sitwell*, 110 Va. 299, 65 S. E. 471; *Richmond* v. *Pemberton*, 108 Va. 220, 61 S. E. 787. However this may be, we believe that the instruction given substantially embodied the same proposition of law as that contained in the instruction refused, namely, that care should be exercised to avoid obvious dangers, and hence that the error, if any, was harmless.

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(b) Then again, defendant in error asked the court to give the following instruction:

"If the jury believe from the evidence that the plaintiff traveled on the south side of Cary street at the point in question after dark knowing of the defect or obstruction in the street complained of, the court tells the jury that he was bound to use ordinary care commensurate with the danger of which he had knowledge taking into consideration the fact of the darkness and that he was required to exercise more caution in such case than if he was ignorant of the defect or obstruction and it was daylight. And if the jury believe from the evidence that the plaintiff failed to exercise in this case such care and caution as the fact of such knowledge and of the darkness and other circumstances shown by the evidence would reasonably require of an ordinarily prudent man, then the plaintiff was guilty of contributory negligence and the jury must find for the defendant, the city of Richmond."

We think this exception is without merit, also, because instruction No. 5, which was given by the court embodies precisely the same proposition of law, the difference being that the instruction refused emphasizes the darkness, but instructs the jury that the plaintiff was required to exercise such ordinary care and caution in passing or avoiding the obstruction complained of as knowledge of its existence and the other circumstances of the case shown by the evidence would reasonably require of an ordinarily prudent person. This, in effect, tells the jury that they should consider the darkness as well as all the other facts shown by the evidence. Among these other facts were, the rain which was falling, and the wind which was blowing, at the time of the accident as well as the street lights and the shadows, if any. *Southern Railway Co.* v. *Baptist,* 114 Va. 731, 77 S. E. 477. We find no reversible error in the refusal of the court to give this instruction. It may be

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said, however, that another objection to giving it may be found in the fact that the court had already given the jury eight instructions, covering two pages and a half of the printed record, and that these instructions sufficiently covered every phase of the case, and that to multiply instructions would have tended to confuse and not to aid the jury.

(c) It is also alleged as error that the court refused to give the following instruction:

"If the jury believes from the evidence that the accident and injury complained of occurred by reason of inattention to or forgetfulness of his surroundings, or by reason of the fact that the plaintiff was walking along the sidewalk with his face turned in a different direction from that in which he was moving, and so failed to discover and avoid the obstruction complained of, the jury must find for the defendant, the city of Richmond, even though the jury may believe from the evidence that the city was guilty of negligence and that the street was not in a reasonably safe condition."

This instruction is based upon the assumption that the injury may have occurred because of the inattention of the plaintiff, forgetfulness of his surroundings, or by reason of the fact that the plaintiff was walking along the sidewalk with his face turned in a different direction from that in which he was moving. Because the jury had already been fully and properly instructed and because there was no evidence upon which it could properly be based, this instruction was properly refused.

(d) Another error is alleged in the failure of the court to give an instruction reading thus:

"If the jury believe from the evidence that the defect in the street complained of in the declaration was such that notwithstanding the defect a person of ordinary prudence in view of all of the circumstances and conditions surrounding the defect as shown by the evidence, would have con-

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sidered the street reasonably safe before the accident for travel in the usual modes by one who was using ordinary care and prudence to avoid accidents—then the jury must find for the defendant."

The refusal of this instruction is fully justified by the fact that the jury had already been fully instructed as to the degree of care required of the city as well as the care required of a traveler upon the streets, and the multiplication of instructions and repetition of the same propositions of law in different language is a practice to be discouraged.

In *Sutherland* v. *Wampler,* 119 Va. 800, 89 S. E. 875, Whittle, J., said: "Time and again this court has condemned the practice of multiplying unnecessary instructions, the only effect of which is hopelessly to perplex the jury and to introduce error into the record. It is the settled rule of this court not to reverse a judgment for the refusal of the trial court to give other instructions when it appears that the jury already have been correctly and fully instructed. This question was dealt with in as many as six cases in 117 Virginia Reports: *Ney* v. *Wrenn,* 117 Va. 85, 84 S. E. 1; *N. & W. Ry. Co.* v. *Perdue,* 117 Va. 111, 83 S. E. 1058; *Eastern Motor Co.* v. *Apperson-Lee Co.,* 117 Va. 495, 85 S. E. 479; *Ratcliffe* v. *Walker,* 117 Va. 569, 85 S. E. 575; *Southern Ry. Co.* v. *Snow,* 117 Va. 627, 85 S. E. 488, and *Wygal* v. *Wilder,* 117 Va. 896, 86 S. E. 97."

3. The other error assigned is the failure of the court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The negligence of the city is plainly manifest from the testimony. The tree root had been in substantially the same condition ever since the annexation of the territory in 1906. It was not simply a root over which one might stumble, but it was a root fully exposed with branches described by several witnesses as follows: "There was a kind of a step—one root above another, you know. It was a kind of a step

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with a kind of a hollow there. It was a mean thing to step in. In bad weather when snow was there I wouldn't attempt to go over there at all, because you couldn't tell where to step. The roots are sort of tangled there." In answer to another question, this witness said: "I got one little stumble there. I went down to my knees." One of the city's witnesses described it as a place that was a little hard for people to walk over and that one could catch his foot in it. The plaintiff stated that he examined the root after the accident and that it rose eight inches above the level of the sidewalk and had an opening like a horseshoe, in which his foot was caught.

The only defense which could be seriously relied on was the defense which is most urged by counsel for the city, namely, that this obstruction was so obviously dangerous that no one could stumble over it without himself being guilty of contributory negligence. When it is remembered, however, that the plaintiff denies that he had knowledge of its existence; that he was a man 71 years of age; that the night was dark and rainy; that the wind was blowing; and that there is a conflict in the evidence as to whether the incandescent light a short distance away and the arc lights at the street corners directly and sufficiently lighted the root, or whether it was obscured by the shadows; and that the city, the plaintiff in error, is here as a demurrant to the evidence; then it seems clear to us that as the question of contributory negligence was properly submitted to the jury, under well-established principles, a mere doubt as to whether the jury decided the question properly, is plainly insufficient to justify this court in reversing the judgment. It will, therefore, be affirmed.

Affirmed.

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Syllabus.

Richmond.

SHENANDOAH VALLEY LOAN AND TRUST CO. v. MURRAY.

March 15, 1917.

1. STREETS AND HIGHWAYS—*Obstructions—Evidence.*—Where there was testimony that defendant's employees painted a house to which a telephone wire was attached, that immediately before the painting the wires were securely fastened to the porch of the house, and, that they were seen immediately after such painting to be unfastened from the porch and the ends loosely wrapped around a tree, the jury were warranted in concluding that the unfastening was done by defendant's employees, no other agency being shown in evidence.
2. STREETS AND HIGHWAYS—*Obstructions—Telephone Line.*—A telephone wire was originally constructed over a public road by and for the accommodation of the former owner of the land. While the defendant after its purchase of the land at no time itself made use of it, the jury were warranted in concluding that the defendant allowed it to remain there because it was of value to its property in view of its being there ready to use. In this situation, the duty rested upon the defendant to use due care to keep the wire in a reasonably safe condition for the public to pass under it. Even though the wire was not a fixture, and for that reason the ownership of it did not pass to defendant, yet since the wire was left to remain over the public road for the benefit of or advantage to the property of defendant, it was its duty to exercise the due care in question, although the wire at the point at which it became a nuisance was not the property of defendant.
3. STREETS AND HIGHWAYS—*Obstructions.*—Where the defendant knew that a telephone wire was sagging over a public road, resulting from its own act in unfastening it from a porch, in ample time to have abated the nuisance before an accident occurred, or by the exercise of reasonable care it could have so known, it was guilty of negligence in not abating the nuisance.
4. STREETS AND HIGHWAYS—*Duty of Traveler.*—Every one has the right to presume that a public highway is in a reasonably safe condition. A traveler on a public street or road, however, is

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held to the exercise of ordinary care, and what is ordinary care, of course, differs in different situations.

5. STREETS AND HIGHWAYS—*Contributory Negligence.*—Where plaintiff while riding in a buggy was injured when the buggy struck a telephone wire sagging across the road, which she, or the person driving her, could have seen if they had been looking for the wire, or looking up and not on the road, the question of plaintiff's contributory negligence was for the jury.

6. DECLARATIONS AND ADMISSIONS — *Self-Serving Declarations.*—Statements made by the plaintiff to a doctor as to her suffering from injuries are admissible, although she had employed him for the purpose of making him a witness in the action which she had determined to institute to recover damages for such suffering and injuries. The circumstance only goes to the weight of the evidence. The diagnosis of plaintiff's condition, made by the doctor under these circumstances, is admissible without an instruction from the court as to the weight to be given thereto by the jury, where no instruction on the subject was asked by defendant.

7. EXPERT AND OPINION EVIDENCE—*Opinion of Non-Expert.*—A statement of a non-expert witness that the plaintiff "seemed to be suffering and nervous," was admissible. Not all conclusions of fact of a non-expert witness are inadmissible in evidence. If it is clear that the jurors were, or could have been, as fully and as exactly furnished with the data which formed the basis for the conclusion of the witness as the latter was, the conclusion is inadmissible in evidence; if not, it is admissible.

8. EVIDENCE—*Streets and Highways—Negligence of Adjoining Landowner.*—In an action for injuries occasioned by the sagging of a telephone wire across a public road, where the landowner allowed the wire installed by a previous owner to remain, testimony that the cost of installing a new 'phone would be less if the wire were allowed to remain was admissible as having a direct bearing upon the question whether the telephone wire was allowed by the landowner to remain across the public road because it was of value to its property.

9. STREETS AND HIGHWAYS—*Negligence of Landowner—Evidence.*—In an action for damages occasioned by the sagging of a telephone wire, testimony as to the condition of the wire about two months after the accident was admissible within the discretion of the court, in the absence of evidence of any change in the condition, where the lapse of time did not necessarily involve a change in the condition.

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10. EVIDENCE—*Prior or Subsequent Existence.*—The general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, but no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential. The admissibility of such evidence must be left largely to the discretion of the trial court.

11. STREETS AND HIGHWAYS—*Obstructions—Evidence.*—In an action against a landowner for negligently allowing a telephone wire to sag across a public road, evidence that, as against another landowner, the telephone company claimed to own the wires connecting his house with the line, was inadmissible, it not being shown that the same contract existed between the company and the two landowners, but, on the contrary, it appearing that the telephone company did not own the wires in the case at bar.

12. NEW TRIAL—*Excessive Damages.*—Plaintiff was confined in bed about five weeks as a result of the accident, and for the first year after the accident was a nervous wreck, some days being able only to work part of the day.

Held: That a verdict of $1,000 was not excessive.

Error to a judgment of the Circuit Court of Fairfax county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

M. L. Walton and *John W. Rust,* for the plaintiff in error.

Moore, Keith, McCandlish & Hall, for the defendant in error.

SIMS, J., delivered the opinion of the court.

This is an action by defendant in error for personal injury caused by the sagging of a telephone wire extending from a pole on land belonging to plaintiff in error, beyond the boundary line of such land, across a public road. The

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former was plaintiff and the latter defendant in the court below, and they will be hereinafter referred to as plaintiff and defendant.

There was a demurrer to the declaration, upon seven grounds of demurrer. The demurrer was overruled by the trial court. This action of such court is made the basis of the first assignment of error.

Thereupon there was a trial by jury resulting in a verdict for the plaintiff for $1,000. The action of the court in overruling a motion of the defendant to set aside such verdict and grant a new trial, on the ground that it was contrary to the law and the evidence, is made the basis of the second assignment of error.

There are eleven other assignments of error.

The questions arising upon the second assignment of error include, in effect, all questions arising upon the demurrer to the declaration; hence, it is not necessary for us to discuss separately the first assignment of error. The questions arising upon all of said assignments of error will be considered in their order.

Preliminary to such consideration, the following facts of the case, material thereto, will be stated, with such supplementary statements of them later as may be deemed necessary in connection with the several questions considered below. In ascertaining such facts the case is, of course, considered as if upon demurrer to the evidence by the defendant.

FACTS OF THE CASE.

The evidence is conflicting as to whether the sagging of the wire which caused the injury was due to its being taken and allowed to remain loose on the side of the road of defendant's land, or because of its insecure fastening on the opposite side of the road on the land of another. The testi-

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mony shows that the wire was not sagging, but was fastened up at a height of some 23 or 24 feet, in good condition, at the time the land of defendant was conveyed to it, about two years and five months before the accident.

There were two telephone wires of a metallic circuit across the road. Only one of these later sagged. The boundary of defendant's land did not extend into, but stopped on the south side of, the public road. The wires were erected and owned by the former owner of the land, for use in connection with a telephone in the dwelling house. The telephone was rented of a telephone company, but the wires were not, being furnished by the said owner. The telephone had been removed before the conveyance of the land to the defendant, but the wires remained, and at the time of such conveyance were securely fastened to the porch of the house, extended thence about 35 feet to a tree in the yard, on which they were fastened to insulators on brackets, thence they passed to the top of a telephone pole set in the ground on the margin of defendant's land near the road, thence above and across the road to trees on the land of another named Huntington. There was, therefore, no sagging of the wire at the time defendant became the owner of the land. The sagging occurred afterwards.

There was no eye-witness who testified as to who unfastened the wires from the porch, but there was testimony that the defendant, by its employees, painted the house about a month after the conveyance of the land to it; that the wires were securely fastened as aforesaid immediately before, and that they were seen immediately after such painting was done to be unfastened from the porch and the ends loosely wrapped around a tree near the porch. No other agency was shown in evidence to have caused this unfastening of the wires. The jury were, therefore, warranted in concluding that this was done by defendant through its employees, the painters.

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There was the testimony of the agent of defendant who had charge of and looked after the property for it that he saw that the wires were detached from the porch three or four months after the defendant became the owner of the land. The condition of the wires then, as seen by this agent, was that the ends, which had been fastened to the porch, were hanging down loose from the tree. The defendant did not by this agent, or any other, fasten the loose ends of these wires.

There was testimony of witnesses for plaintiff to the effect that from four or five months before the accident one of the wires was sagging across the road, due to its having been loosened by a tree falling across the telephone line on the Huntington side of the road; that witness took the wire which was sagging, drew it up tight about 12 feet above the road, high enough to permit a buggy to pass under it without catching if the buggy was in the middle of the road, but possibly not high enough to prevent a load of hay from catching on it; and wrapped the wire four or five times around a fence post on the Huntington side; that after the accident it was in the same position as he left it; that after he fixed it, it did slip from that side. This witness further testified that while the right of way for it might have been 30 feet, the road itself was narrow and just wide enough to drive in; and Mr. Jerman, who was driving the plaintiff in his buggy at the time of the accident, testified that he was driving in the middle of the road.

There was other evidence bearing on this question of fact, but it is deemed unnecessary to state it in more detail here, as this court cannot try the case upon a question of fact where the evidence is conflicting. It is sufficient to say that it was conflicting and that there was sufficient evidence to warrant the jury in finding that the initial cause of the sagging of the wire across the road

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low enough to cause the accident resulting in injury to the plaintiff, was the act of the defendant, through its employees, in taking loose the wires from the porch; that is to say, there was sufficient evidence before the jury to warrant it in finding that the act of the defendant caused the nuisance of the sagging wire across the road from which the plaintiff received her injury.

At the time of the accident one of the wires had sagged down so low over the road as to catch on the top of the buggy in which plaintiff was seated, although the top was two-thirds turned back, and to come within 18 inches or two feet of her head. As to when the wire reached and how long it had remained in this condition before the accident, there was evidence before the jury which warranted them in finding that such condition existed for three or four months before the accident.

The road was straight as the plaintiff approached the place of accident for some distance, and the sagging telephone wire could have been seen by the plaintiff if she had looked for it, from a sufficient distance away for her to have avoided the accident. But there was no evidence that the plaintiff, or the person driving her, knew before the accident of the condition of the wire, or had their attention called to it, except by the presence of the wire itself hanging over the road.

The accident, the resulting injury to the plaintiff, etc., occurred as follows, in accordance with the testimony of the plaintiff and of Mr. Jerman, her employer, who were the only witnesses to the occurrence: Plaintiff, a typewriter, in the employment of Mr. Jerman, was in his top buggy, and was being driven by him, the horse in a slow trot, up a slight grade in the road. It was about 11 o'clock A. M., a bright, clear day. Plaintiff and Mr. Jerman were looking in the direction of defendant's property, discussing it as compared with a piece of property Mr. Jerman had

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bought. They had to look up the road to look at the property. Plaintiff was looking at stumps in the field before they got opposite the house, then at the house; the house was about opposite to her when the wire struck the buggy; her sight was all right; the road was level. If the plaintiff or Mr. Jerman had been looking for the wire, or looking up and not on the road, they could have seen the wire; but they were not looking up in the air, and it was hard to see a wire the size of that which caused the accident. The wire caught the top of the buggy and pulled the top off; plaintiff was thrown out and her right foot must have caught under a little iron part of the running gear of the buggy, and she was dragged about 50 yards while the horse was running. The horse ran away as fast as it could, requiring all the energy of Mr. Jerman to stop it. As a result of the fall and dragging, plaintiff was bruised and injured on and about her back, hips and legs, and she continued to be sick at her stomach next day, but went to Fairfax to work. She had not been sick before for ten years. After she got to Fairfax, the day after the accident, she felt so sick that she called Dr. Moncure into Mr. Jerman's office; she then went to Dr. Moncure's office and he examined her and gave her some medicine; she then returnd to her home at Ballston, Va. She was confined in bed about five weeks as a result of the accident; and for the first year after the accident she was a nervous wreck; some days she would only be able to work part of the day. She suffered with her hips and head, and she continued to suffer up to the trial of the case with her hips, back and side. Dr. Moncure saw her once at her home at Ballston, and Dr. Howard Fletcher right often. Mr. Jerman also testified that "she seemed to be suffering and nervous."

On the subject of the wires, brackets, insulators and telephone pole on the land of defendant, and the wire extending from such land across the road, the deed to defendant

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was introduced in evidence, which was in the usual form of a deed of bargain and sale from a trustee who has sold land under a deed of trust, and contained no reservation or mention of pole, wires or attachments. On this subject there was testimony for plaintiff that the former owner of the land, pole, wires and attachments did not claim or exercise any acts of ownership over the poles, wires and attachments after the conveyance to the defendant. There was testimony also tending to show that the allowing of the poles, wires and attachments to remain on the land of defendant was of value to the property, in that they were there ready for use in the event any occupant of the land wished to install a telephone, and in such case would save expense in having a 'phone installed.

We will now consider the several questions arising upon the assignments of error in their order as stated below.

1. Was there any duty resting upon the defendant to exercise due care to keep the telephone wire in question, where it extended beyond defendant's premises across the public road, in a reasonably safe condition for the public to pass under it?

We think that such duty did rest upon the defendant.

As noted above the wire in question was originally constructed over the public road by and for the accommodation of the former owner of the land of defendant. The purpose for which it was there was obvious. While it is true that the defendant at no time itself made that use of it, the jury were warranted in concluding that defendant allowed it to remain there because it was of value to its property in view of its being there ready for such use. In this situation, the duty rested upon defendant to use due care to keep the wire in question in a reasonably safe condition for the public to pass under it—certainly to the extent that defendant's use of its land might affect the condition of the wire where it crossed the public road.

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We think the principle underlying the following cases is applicable to the case before us.

As was said in *Canandaigua* v. *Foster,* 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575, which was a case in which a recovery was allowed of damages paid by the trustees of the village on account of personal injuries sustained through an accident caused by a defective grating in a sidewalk: "It was his duty, however, as long as he owned and was in full possession of the premises, to use reasonable diligence to keep the grate in repair, so that it would be as safe as any other part of the sidewalk. *Congreve* v. *Morgan,* 18 N. Y. 84, 72 Am. Dec. 495; *McGuire* v. *Spence,* 91 N. Y. 303, 43 Am. Rep. 668; 2 Shearm. & Redf. Neg., 5th ed., sec. 703. It was built for his accommodation, and was a benefit to his property only; and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over it as a part of the sidewalk. Proper construction, in the first place, was not enough to relieve him from liability; but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. As was said as early as *Heacock* v. *Sherman,* 14 Wend. (N. Y.), 58, 60, the owner 'is bound to repair * * * in consideration of private advantage.' The doctrine of implied duty, which is well established by the authorities, requires the person who, even with due permission, constructs a scuttle hole in the sidewalk in front of his premises, to use reasonable care for the safety of the public, as long as it remains there and is subject to his control. *Babbage* v. *Powers,* 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398; *Wolf* v. *Kilpatrick,* 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; *Jennings* v. *Van Schaick,* 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; *Port Jervis* v. *First Nat. Bank,* 96 N. Y. 550; *Daven-*

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port v. *Ruckman*, 37 N. Y. 568; *Swords* v. *Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Briggs* v. *New York C. & H. R. R. Co.*, 30 Hun. (N. Y.), 291; *Heacock* v. *Sherman*, 14 Wend. (N. Y.), 58; *Seneca Falls* v. *Zalinski*, 8 Hun. (N. Y.), 571; *Whalen* v. *Gloucester*, 4 Hun. (N. Y.), 24; *Mathews* v. *De Groff*, 13 App. Div. 356, 43 N. Y. Supp. 237; Elliott, Roads and Streets, p. 541; Thomas, Neg., 1145.

* * * * * *

"That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and, as the necessity is continuous, so is the duty. Upon no other ground can the construction of the grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee.

* * * * * *

"If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession."

In the case of *Allen* v. *Linquist*, 43 App. D. C. 538, which was a case of personal injury received from a gate swinging over a sidewalk from a fence, not on, but in front of the defendant's premises, which the latter had the right to use as appurtenant to his ownership of his lot, the court said: "The right of Allen to use the parking was an appurtenance passing to him with the fee in the lot. Being such, so long as he permitted the fence to stand and enclose the parking, presumably for his private convenience, he was responsible for its condition * * * The fence was built for the protection and accommodation of the abutting property. When Allen purchased the property, the fence

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and the right to use the enclosed parking passed as appurtenant thereto. He was not required to keep the fence there; but, so long as he permitted it to remain, he was responsible for its condition and proper repair."

The opinion proceeds: "The rule here is not different from that applied where property owners construct for their own use openings under and through the sidewalk in front of their premises. In such cases the property owner is held liable if the sidewalk, by reason of such use, becomes a nuisance, or in such repair as to cause injury to a person using the walk."

In this view of the case before us, it becomes unnecessary to consider the position of counsel for defendant that the telephone wire was not a fixture, and for that reason the ownership of it did not pass to defendant. If that position were conceded to be correct, yet, since we must regard as a fact in the case that the wire was left to remain over the public road for the benefit of or advantage to the property of defendant, it was its duty to exercise the due care in question, although the wire at the point at which it became a nuisance was not on the property of defendant.

2. Was there sufficient evidence to warrant the jury in finding that the defendant was guilty of negligence in not abating the nuisance?

As we have seen above, this is not the case of a nuisance existing at the time the defendant became the owner of its property—not the case of a nuisance caused by an act of a former owner of the property. It is a case of a nuisance caused by an act of the defendant itself, and there was evidence before the jury that the nuisance had existed for three or four months prior to the accident. The jury might have well concluded from the evidence that the defendant either knew of such condition of the wire, resulting from its own act in unfastening it from the porch, in ample time to have abated the nuisance before the accident, or that by

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the exercise of reasonable care it would have so known, and, hence, that it was guilty of negligence in not abating the nuisance.

3. Was the plaintiff guilty of contributory negligence which should bar her recovery?

We think not.

This was a question of fact for the jury. We have referred above to the points in the testimony bearing upon this subject. We cannot say as a matter of law that the plaintiff was guilty of negligence *per se* so as to take this question from the jury. It is true it has been repeatedly held by this court that a traveler on a public street is held to the exercise of ordinary care (*Osborne* v. *Pulaski Light & W. Co.*, 95 Va. 16, 27 S. E. 812; *Moore* v. *City of Richmond*, 85 Va. 545, 8 S. E. 387), and this is equally true of a traveler on a public road. But what is ordinary care of course differs in different situations.

As was said by this court in *Watts* v. *Southern Bell T. & T. Co.*, 100 Va. 45, 40 S. E. 107, "Every one has the right to presume that a public highway is in a reasonably safe condition. * * *"

In *Weaver* v. *Dawson, &c. Telephone Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, the plaintiff was seated on a hayrack, riding along a public road when injured by coming in contact with a telephone wire. With reference to the contention that he was guilty of contributory negligence, the court said: "This contention is not well founded. Driving along a road under a telephone or telegraph wire properly constructed is not attended by any danger. It is unlike crossing a railroad, where a train is liable to pass at any time, and the rule which would require a person about to cross a railroad to stop and look before so doing has no application to a person driving along either a public or private road which is crossed by telephone or telegraph wires. The plaintiff did not observe that the wire was down, or that it was likely to strike his hayrack."

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In *Penn. Telegraph Co.* v. *Varnau* (Pa.), 15 Atl. 624, the plaintiff's intestate was on top of a load of furniture driving along a public road. He had passed the point opposite and was looking back at some persons working in an adjacent field, when he was struck by a wire across the road, was knocked off and killed. On the claim of the defendant that there was contributory negligence, the court held that it was a question of fact for the jury.

The case of *Jacks* v. *Rieves*, 78 Ark. 426, 95 S. W. 781, is a well considered and instructive case. There the plaintiff was injured by the top of her surrey coming in contact with a telephone wire sagging across a public highway, which frightened her horse, and the plaintiff, in her fright, jumped out of the surrey and was injured. The court, among other things, said: "It is not expected or required of a traveler driving easily along the middle of a much traveled highway to be looking up to see if perchance a stray wire is in reach of the top of a vehicle."

In *Lloyd* v. *Railway Company*, 110 Ga. 165, 35 S. E. 170, referring to the plaintiff and the driver of his carriage, the court said: "They were upon the street where they had the right to be, and were driving in an ordinary manner, and had no reason to apprehend that a wire would be across their pathway, and there was nothing to put them upon their guard against such an obstruction. When a person is in the habit of traveling the streets of a city, day after day, and those streets are clear of obstruction, whether ordinary care would require that he should look out for unusual obstructions, we, as a court, do not know. Whether he ought to see a wire the size of the little finger, when he is looking straight ahead in the direction of the wire and could have seen it at a much greater distance, if his attention had been called to it, is, it seems to us, a question for the jury and not for the court."

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The question of whether the doctrine of imputable negligence, which was involved in the case of *Atlantic & Danville R. Co.* v. *Ironmonger*, 95 Va. 625, 29 S. E. 319, is applicable to the case before us, discussed by counsel for defendant, need not be considered by us, as we do not think there was anything in the conduct of Mr. Jerman, the driver of the buggy, which amounted to contributory negligence *per se*.

In connection with the question of contributory negligence in the case at bar, it should perhaps be noted that there was a conflict between the testimony of the plaintiff and her own witness, Mr. Jerman, on the matter of whether the sun was shining in her face so that she could not see the wire. She testified that such was the case. Mr. Jerman testified to the contrary and stated that they were traveling in a direction which placed their backs to the sun. This was peculiarly for the consideration of the jury. It went only to the credibility of the witnesses, and as to which, if either, the jury believed stated the facts correctly. Besides, the plaintiff's case did not turn wholly upon the circumstance mentioned.

4. Were statements made by the plaintiff to Dr. Moncure, that "she was suffering with pain in her left hip and back and from the small of the back down her left side, and that she had a very bad headache, and other statements of the plaintiff to such doctor as to how she was suffering," admissible in the testimony of Dr. Moncure?

We think they were.

The testimony does not make it clear whether the plaintiff had determined to institute suit at the time she consulted Dr. Moncure, and that she employed him with the purpose of making him a witness in case of suit. Counsel for defendant contend that this was the fact. In such case, the authorities are in conflict as to the admissibility of such statements. A number of cases are cited to sustain the

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position that they are inadmissible. We think, however, that the weight of authority and of reason is in favor of their admissibility, even though made after the commencement of the suit and with the purpose of using the physician as a witness. The circumstance that they are then made goes only to the weight of the evidence. 8 R. C. L., p. 640 and note; 21 L. R. A. (N. S.) 827; 16 Cyc. 166; where the authorities cited and relied on by counsel for defendant are referred to. The case of *C. & O. Ry. Co.* v. *Parker*, 116 Va. 370, 8 S. E. 183, cited by such counsel does not appear to have involved statements of the plaintiff's intestate in regard to his physical condition in connection with a consultation of the ambulance surgeon with respect thereto, but statements with respect to occurrences at the time of the accident.

5. Was the testimony of Dr. Fletcher relating to his diagnosis of the plaintiff's condition, made after the suit had been decided on, admissible without an instruction from the court as to the weight to be given thereto by the jury?

We think it was, for reasons stated next above, as no instruction on the subject appears from the record to have been asked by the defendant.

6. Was the statement of the plaintiff's witness, Mr. Jerman, that the plaintiff "seemed to be suffering and nervous," admissible in evidence?

We think it was.

This was a statement of fact. It is true it was to some extent a conclusion of fact—of inference from data observed by the witness; but not all conclusions of fact of a non-expert witness are inadmissible in evidence. The test of admissibility of a conclusion of fact of a non-expert witness is this: Is it clear that the jurors were or could have been as fully and as exactly furnished with the data which formed the basis for the conclusion of the witness as the latter was? If so, the conclusion is inadmissible in evidence; if

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not, it is admissible. Wigmore on Ev., secs. 1917-8-9, 1920-1, 1924, 1926, and cases cited; *Hot Springs, &c. Co.* v. *Revercomb,* 110 Va. 240, 65 S. E. 557. The citations from Wigmore on Evidence require a reading of all of them to fully develop the subject. We regret that their length prevents quotation from them here on a question arising so frequently in practice.

Applying the test above stated, we think the testimony in question was admissible.

The cases of *Atlantic Coast Line R. Co.* v. *Caple's Admx.,* 110 Va. 515, 66 S. E. 855, and *Overdy* v. *C. & O. Ry. Co.,* 37 W. Va. 524, 16 S. E. 813, cited and relied on by counsel for defendant, are not in conflict with this conclusion.

7. Was the statement of one of plaintiff's witnesses, "That if the company" (defendant) "had installed another 'phone in the Kidwell house, the same pole and wires could be used, if intact, and that in such event the company" (the telephone company) "would only charge for the work done in installing the 'phone," admissible in evidence?

We think it was.

This testimony had a direct bearing upon the question whether the telephone wire was allowed by defendant to remain across the public road because it was of value to its property. This was a material issue in the case. Therefore, the authorities cited by counsel for defendant on this point to the effect that evidence bearing on no issue in the case, or very remotely bearing on an issue therein, should be excluded, are inapplicable.

8. Was the testimony admissible of one of the witnesses for plaintiff as to this condition of the wires about two months after the accident?

We think that it was within the discretion of the court to admit such testimony in evidence in a case such as that at bar, in the absence of evidence of any change in the con-

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dition. This is not a case where the lapse of time in question necessarily involved a change in condition.

In *Washington, &c. R. Co.* v. *Vaughan*, 111 Va. 785, 791, 69 S. E. 1035, 1037, this court said: "Where the existence of a thing at a given time is in issue, its prior or subsequent existence is, according to human experience, some indication of its probable existence at a later or earlier period."

And again on the same page: "The general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down. But, says Prof. Wigmore, 'That no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential is sufficiently illustrated by the precedents, from which it is impossible (and rightly so) to draw a general rule.'"

And again: "Since it is impossible to lay down any general rule as to the time or the conditions within which a prior or subsequent existence is evidential, the question of the admissibility of such evidence must be left largely to the discretion of the trial courts."

We do not think that the authorities *Potomac, &c. R. Co.* v. *Chichester*, 113 Va. 333, 74 S. E. 162; 1 Wigmore on Ev., sec. 437; *Wash. Alex. & Mt. Vernon R. Co.* v. *Vaughan, supra;* 10 R. C. L. 943; and 29 Cyc. 614, cited and relied on by counsel for defendant, are in conflict with this conclusion.

9. Was the ruling of the court below erroneous in refusing to permit a defendant's witness to testify that the telephone company had taken the 'phone out of a house witness had in hand for sale as a real estate agent; that witness asked the telephone company's permission to remove the wires which were left on such property, and that the telephone company refused such permission, saying that the wires belonged to the company?

We think not.

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In that case the telephone company claimed to own the wires. It is not shown in evidence in the case at bar that the same contract with the telephone company existed as in the case referred to by the witness. On the contrary, it is expressly shown in the case at bar that the telephone company did not own the wires.

10. The court below gave the following instruction (among others) at the request of the plaintiff:

"A. The court instructs the jury that every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges and appurtenances of every kind belonging to the land, and if they believe from the evidence that the telephone loop, consisting of a pole, wires and attachments was installed on the Kidwell property in 1907, for the convenience of the owner of the said property and that the telephone company did not own or retain any interest or exercise any acts of ownership over said telephone pole, wires and attachments and that they remained on said property after the telephone was taken out in December, 1910, and were there when *Maurice* Kidwell and Ruth G. Kidwell executed the trust deed of April 26, 1910, and when said trust was foreclosed on May 18, 1911, and that the deed by which the property was conveyed to the defendant company contained no reservation of ownership of the pole, wires and attachments and that the owner of the said property during all the period between December, 1910, and the time of the accident to the plaintiff had the right and privilege to use said pole, wires and attachments for the installation of another 'phone, then the court instructs the jury that said pole, wires and attachments passed under the deed of May 18, 1911, to the defendant and became its property."

Counsel for defendant take the position that this instruction was erroneous on three grounds, which will now be considered in their order.

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(a) Because such instruction was without evidence to support it.

Counsel refer to the statements of several witnesses, among them to that of Follin, to the effect that the wires "were of no use to the owner of the property except to put in another telephone again;" of Church, "that if another 'phone had been installed in the Kidwell house, the same pole and wire could be used if intact, and that in such case the (telephone) company would only charge for the work done in installing the 'phone." There was also testimony to the effect that the telephone company never owned these wires, and was not operating them at the time of the accident; that Mrs. Kidwell, the former owner of the farm, once owned them and had them installed for her use and benefit as occupant of the farm; that she left them attached to the freehold and laid no claim to them after the sale of the farm to the defendant.

We, therefore, do not think this ground of objection to the instruction is well taken.

(b) Because the instruction does not state a proposition of law, even if the facts as stated are true.

Counsel give no reasons for their position. We do not think it is tenable.

(c) Because the instruction is ambiguous.

We do not think the instruction open to this objection.

11. The court below gave also the following, among other instructions, at the request of the plaintiff:

"B. The court instructs the jury that if they believe from the evidence that the wire which injured the plaintiff sagged from the Kidwell side by virtue of the fact that it was detached from the house and insecurely wrapped around a tree near the house on that side after the Kidwell property passed to the defendant company, and that the sagging which caused the wire to injure the plaintiff did not come from the Huntington side, and that for three or

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four months before the injury the wire had been gradually sagging from the Kidwell side so that it was a danger and menace to the traveling public, and that during all this time the defendant company had full control and dominion over the said Kidwell property and wire, and knew of its sagging condition, or could have ascertained the same by ordinary diligence, it thereupon became the duty of defendant to use due care to either remove said wire from across the public road, or to so fasten and secure it that it would not be a danger or menace to the traveling public, and if they further believe the defendant company failed to perform this duty, and as a direct and proximate result of such failure plaintiff was injured without negligence on the part of herself or the driver of the buggy, their verdict should be for the plaintiff."

Counsel for defendant claim that there was no evidence to support this instruction.

As noted above, there was a conflict in the evidence with respect to which side of the road the wire slacked from in order to sag across the road. It did not break over the road or within the line of the poles and post to which it was fastened on each side of the road and in that way fall down in the road. It sagged down over the road. The physical fact was that, in order to do so, of necessity it must have given way and slipped from one side or the other, or from both sides of the road—from defendant's property or from the land on the opposite side of the road, or from both. There was evidence of the loose ends of the wires left unfastened, or insecurely fastened, on the side of defendant's land, for a long time before the accident, to account for the sagging of the wire. In view of the testimony of defendant's own agent as to what he knew of the location and condition of the wires from a time over two years before the accident, there was also, as above noted,

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evidence to warrant the jury in finding that the defendant knew of or by the exercise of reasonable care ought to have known of the dangerous condition of the wire over the road, in more than sufficient time to have abated the nuisance before the accident, and that the defendant was therefore guilty of negligence in not so doing.

Therefore, we do not think the objection made to this instruction is well grounded.

12. The court below refused to give the following instruction at the request of the defendant:

"(6) The court instructs the jury that if the plaintiff could have seen the wire in question if she had looked at it, and that if they believe from the evidence that she was not looking to the front, but that her face was turned away in the direction of the Kidwell house, then she was guilty of gross negligence and is not entitled to recover."

This involves the same question as to contributory negligence considered in our third heading above. For the reasons there given, we think the court committed no error in declining to give this instruction.

13. Was the verdict for $1,000 so excessive as to constitute error in the ruling of the court below refusing to set the verdict aside?

We think not.

There is no evidence of any prejudice or passion on the part of the jury. We do not consider the amount of the verdict as such evidence, under the circumstances of this case, and hence we do not think this point well taken.

One objection to the ruling of the court below in allowing Mr. Browning, the agent of the defendant, to be asked as to his failure to fasten the wires after he saw them hanging loose, is not specifically noticed above, for the reason that such objection was made on the ground that

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the defendant owed no duty with respect to keeping the telephone wires over the road in a reasonably safe condition for the public to pass under them. This ground has been fully considered and discussed above.

Upon the whole case, we are of opinion, for the reasons stated above, that there was no error in the judgment complained of; and it will be affirmed.

Affirmed.

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Richmond.

March 15, 1917.

1. EXECUTORS AND ADMINISTRATORS—*Care to be Exercised by Executor or Trustee.*—Nothing more is in general required of an executor or trustee than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs.
2. EXECUTORS AND ADMINISTRATORS—*Advice of Court.*—Although under the terms of the will, a surviving executor had the power to sell the property of his testator without an order of court, yet he had the right, notwithstanding such power, to go into a court of equity for advice and instruction upon the proposition, and having taken that course in good faith, he is fully protected by the order of court under which he acted.
3. PARTNERSHIP—*Purchasing Partner—Burden of Proof.*—A partner, more intimately acquainted with the business of the partnership than his other partners, is required, when he seeks to purchase their interests, to act openly and in good faith. But the burden of proof does not rest on such purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud.
4. TRUSTS AND TRUSTEES—*Trustee Dealing With Beneficiary—Seeking Independent Advice.*—Where a beneficiary dealing with the trustee has sought and obtained independent advice from a person competent to advise as to the particular transaction, this fact will go far to give assurance of its fairness and to induce a court of equity to uphold it.
5. PARTNERSHIP—*Purchasing Partner.*—The managing partner in a concern sought to buy the interest of a deceased partner from his executor. The executor not relying upon the representations of the managing partner invoked the aid and advice of a court of equity. The court upon the report of a commissioner appointed to investigate the proposition to the effect that the price offered was a good price and advantageous to the beneficiary, confirmed the report and directed the sale.

   Held: That under these circumstances the burden of proof to show fraud and undue influence would be upon the parties attacking the sale.

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Appeal from a decree of the Circuit Court of Elizabeth City county. Decree for the defendants. Complainant appeals.

Affirmed.

The opinion states the case.

Allen D. Jones, for the appellants.

Jones & Woodward, R. M. Lett and *J. W. Read,* for the appellees.

KELLY, J., delivered the opinion of the court.

The record in this cause embraces more than eight hundred printed pages. The case has been well argued, both orally and in the briefs. We have given it careful consideration, and it must now suffice to state briefly the essential facts as we find them and the principles of law governing the same.

In the year 1888, W. N. Armstrong, J. S. Darling, G. A. Schmelz, Geo. S. Schermerhorn and James McMenamin obtained a charter of incorporation for the Powhatan Oyster Company with the purpose of acquiring oyster grounds and buying, planting and selling oysters. It appears that this company took charge of and planted certain oyster grounds theretofore assigned to some of the incorporators, and about the same time made a contract with Frank W. Darling to superintend its out-of-door work, subject to the direction and control of its officers. Shortly thereafter the incorporators decided to abandon the use of the charter and to divide the oyster grounds and oyster business of the company into five equal shares, one to be owned by each of the

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persons interested in the company. The grounds were accordingly laid off and assigned in five divisions to each of the parties, but as it was not feasible to equally divide the oysters in this way, each party remained the owner of an undivided interest therein. The business itself was not affected by these changes, F. W. Darling continuing as the superintendent, and the interests of all the parties being held together under the company name and operated under one management. In the course of time, W. N. Armstrong assigned his interest to M. C. Armstrong, and James S. Darling assigned his interest to F. W. Darling. Still later M. C. Armstrong withdrew from the association, receiving an allotment of the oyster ground and a certain sum of money for his share in the oysters. Thus the joint business was reduced to four shares, held, respectively, by James McMenamin, Geo. S. Schermerhorn, Geo. A. Schmelz and Frank W. Darling, the latter remaining also the superintendent or manager.

James McMenamin died in 1901, leaving a will whereby he appointed Henry L. Schmelz and Geo. A. Schmelz his executors. George Schermerhorn died in 1905, his widow succeeding to his rights in the oyster company. Geo. A. Schmelz died in 1911, and Henry L. Schmelz and John Garland Pollard became his administrators.

F. W. Darling was thus left as the sole survivor of the parties originally connected with this enterprise. From the outset he had been, under varying contracts, the manager for all the parties, and was more familiar with the business than any of the others; and under his management it had been quite profitable to all concerned.

Some little time after the death of Geo. A. Schmelz, Darling called on Henry L. Schmelz for the purpose of discussing a settlement of the business; the latter asked him how a settlement could be made, and he replied as follows: "I stated to him that I was perfectly willing to abide by our

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understanding among us in the first agreement, or the old agreement—which was that we divide up the oysters—sell the oysters and let me out. I told him I was perfectly willing to do that—sell the oysters—and let each man take his share of the ground. He asked me would I consider purchasing it. I told him yes, I would consider purchasing it * * * I told him that I would consider the purchase of all the interests in the property. I did not mention any price or anything more at that time as to the purchase of it. He stated to me he would take the matter up with Mr. Pollard, and when they were in position to consider an offer would let me know." After the lapse of more than a year, during which time there had been some further negotiations, Darling met Schmelz and Pollard at their request and, upon being asked for his proposition, told them, in substance, that he would give $20,000 in cash for each interest in the property as it stood, oysters, ground and everything connected with it. They requested him to reduce the proposition to writing, which he accordingly did.

At the time this offer was made, there was still pending in the Circuit Court of Elizabeth City county a chancery suit under the style of *McMenamin's Ex'or* v. *McMenamin et al*, which had been instituted by the executors shortly after the death of James McMenamin for the purpose of having a construction of the McMenamin will, and to obtain instructions by the executors as to certain of their duties.

H. L. Schmelz had the power, under the terms of the will, to make the sale, but he preferred to submit the matter to the court, and he accordingly filed his petition in the last-mentioned cause, reciting the proposition made by Darling and asking the instructions of the court. In this petition he recommended the proposition, but showed that he had not accepted it, and would not do so without the approval of the court. This petition named as defendants Mary McMenamin Shepherd and James and John McMenamin, the

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children and devisees of James McMenamin, who, under the residuary clause in his will, would be entitled to the property, or the proceeds thereof. Mary McM. Shepherd and James McMenamin were both of age, answered the petition and prayed the court to approve the offer. John McMenamin was not of age, and he filed a formal answer by his guardian *ad litem*. The circuit court referred the question to a commissioner, who took depositions and returned the same along with his report in favor of the acceptance of the offer, and the court thereupon confirmed the report and directed the sale.

The sale was accordingly made, being consummated in July, 1912.

In August, 1913, on the day on which John McMenamin attained his majority, and under circumstances not necessary here to detail, but which plainly show that the executor, Schmelz, acted openly and above criticism, the three residuary devisees, Mary McMenamin Shepherd, James and John McMenamin, made a final settlement with the executor, executing to him their releases and receipt in full.

In October, 1913, the present suit was brought by Mrs. Shepherd and James McMenamin against H. L. Schmelz, surviving executor and trustee of James W. McMenamin, deceased, and Frank W. Darling, charging that the sale to Darling was procured by him by means of undue influence over the executor, and by fraud and misrepresentation on Darling's part, and by negligence or connivance on the part of Schmelz; and the bill charges that the latter is liable to the complainants and to their brother, John McMenamin, who was made a defendant in the suit, for the fair cash value of the property, subject to a credit of $20,000, which was paid to the executor by Darling, and by him in turn paid to the complainants and John McMenamin. No specific relief is asked, however, against the executor in the prayer of the bill, except in so far as it is embraced in the prayer

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for general relief; and the special prayer and main purpose of the bill is to have the sale to Darling set aside and require him to account to the complainants and their brother for the value of the property, subject to a credit of $20,000 theretofore paid by him, it being claimed by them that the fair cash value of the property was greatly in excess of the amount which he paid. John McMenamin answered the bill, admitting its allegations, and joining in its prayer.

So far as the case against the executor is concerned, it seems to be free from any sort of difficulty or question.

We find nothing in the evidence to show either negligence or bad faith on his part. A careful consideration of the history of the business and the conduct of Henry L. Schmelz in connection therewith, and particularly in connection with the transaction under consideration, shows that he acted cautiously and prudently, and did nothing to indicate that the confidence reposed in him by James McMenamin, who evidently knew him well and trusted him fully, was violated; and in the negotiation with Darling he certainly acted with no less care than he or any other reasonably prudent man would have been expected to act in his own affairs. This was all that was required of him as executor and trustee.

Professor John B. Minor, in discussing the degree of care required of a trustee, says: "But nothing more is in general required than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. If more than this were exacted, it would tend to the disadvantage of persons interested in trusts in general because it would discourage competent persons from accepting the administration of trusts." 2 Minor's Inst. (4th ed.), p. 255. See also, to the same effect, 2 Pom. Eq. Jur., sec. 1070; *Elliott* v. *Carter*, 9 Gratt. (50 Va.) 541; *Meyers* v. *Zetelle*, 21 Gratt. (62 Va.), 733; *Davis* v. *Harmon*, 21 Gratt. (62 Va.), 199; *Thompson* v. *Brooks*, 76 Va. 166.

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Although the contention is made by the appellants that Schmelz, as surviving executor, did not have the power to sell the property without an order of court, we are of opinion that, under the plain provisions of the will, he clearly did have this power, and that the same was not in any way affected or diminished by the previous proceedings in the above-mentioned suit of *McMenamin's Ex'or* v. *McMenamin et al.* But it is equally true that, as executor and trustee, he had the right, notwithstanding such power, to go into a court of equity for advice and instruction upon the proposition. Having taken that course in good faith, as we think the evidence shows he did, he is fully protected by the order of the court under which he acted. 2 Minor's Inst. (4th ed.), p. 256; 2 Pom. Eq. Jur., sec. 1064; 21 Cyc. 88.

Coming now to the case as it affects Frank W. Darling, we are of opinion that it likewise must fail.

It is contended most earnestly by counsel for the appellants that, inasmuch as Darling occupied the relationship of a partner to the other parties, and especially in view of the fact that he was more intimately acquainted with the business of the company than any of the other partners, it was his duty to make a full disclosure, and that the burden was upon him to show affirmatively that he did make such disclosure, and that he acted in all respects with the utmost good faith. In the recent case of *Aronhime* v. *Levinson*, 119 Va. 394, 89 S. E. 893, this court, while fully recognizing the rule requiring a purchasing partner to act openly and in good faith, expressly held that the burden of proof did not rest on the purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud. Conceding, without discussion, that the appellants are right in contending that Darling occupied the relation of a partner to Schmelz, the decision in the *Aronhime Case* is absolutely controlling here so far as the question of the burden of proof is concerned. But were the rule otherwise, the

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result would be the same in this case. Henry L. Schmelz, as executor and trustee under the will of James McMenamin, had been representing the McMenamin interests in this business for eleven years, and, along with John Garland Pollard, his co-administrator, he had been representing another interest in it for about six years. It is true that Darling was more intimately acquainted with the details and doubtless with the accounts and financial condition of the business than his co-partners, but his co-partners did not rely upon his representations, and resorted to the safest method known to the law in obtaining indepedent advice; they invoked the aid and advice of a court of equity (Schmelz and Pollard, administrators, likewise participating informally in this application to the court). The case, therefore, in our opinion, is brought clearly within the principle enunciated by Judge Riely in *Tenant* v. *Dunlap*, 97 Va. 236, 33 S. E. 624, as follows: "There is no doubt that where a beneficiary dealing with the trustee has sought and obtained independent advice from a person competent to advise as to the particular transaction, this fact will go far to give assurance of its fairness and to induce a court of equity to uphold it."

In the court proceeding above referred to, the proposition from Darling to Schmelz was, as we have seen, referred to a commissioner, who made a thorough investigation of the proposition, taking the testimony of a number of widely known and experienced oyster men. Before his investigation was completed, John Garland Pollard, one of the co-administrators representing another interest, indicated that he would like to have some further proof taken, and thereupon the court directed certain additional evidence, and when this was in, the commissioner reported that the price offered was a good price, and that the sale would be an advantageous one for the James McMenamin estate. The court thereupon confirmed the report, and directed the sale, which was accordingly made.

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In addition to the report of the commissioner and the approval of the circuit court, we think the proof in the present case shows that the sale was fairly made, and that the price, in view of all the contemporaneous circumstances, was adequate, or at least that it was very far short of the inadequacy which would have to appear under well settled and familiar rules of law to justify an interference therewith in the present case. A most significant, if not a conclusive circumstance, appearing in the record is that the other interests, represented respectively by Pollard and Schmelz, administrators, and by Mrs. Schermerhorn, sold to Darling at or about the same time and at the same price, and are not seeking relief.

It is contended that Darling, during the negotiations leading up to the sale, acquired an undue influence over Schmelz by obtaining a controlling interest in two banks from each of which the latter was drawing a large salary. The evidence, we think, wholly fails to show any attempt on the part of Darling to exercise, or that he in fact possessed, any such undue influence.

The decree complained of seems to us so clearly right, upon the grounds already discussed, that we deem it unnecessary to go into the question as to whether the sale was a private or a judicial sale. Of course, if it was the latter, and we have not perceived why it was not, the present suit would have to fail because it does not meet the requirements of a suit to set aside the decree under which the sale was consummated. See *Harrison* v. *Walton*, 95 Va. 724, 726-7, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830, and authorities there cited.

Upon the whole case, we are of opinion that the decree complained of is plainly right, and it must be affirmed.

Affirmed.

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Richmond.

STANDARD PAINT COMPANY v. E. K. VIETOR & COMPANY.

March 15, 1917.

1. DEMURRER—*Overruling Demurrer—Special Demurrer.*—By section 3272 of the Code, special demurrers are abolished in Virginia, and there is no error in overruling a demurrer to a declaration, where the assignment of grounds of demurrer pointed out no defect not cured by this section, which provides that on demurrer no defects in the pleadings shall be regarded unless something be omitted essential to the action or defense.
2. PLEADING—*Waiver of Defects—Amendments.*—After the plaintiff had rested and the defendant had introduced one witness, the court allowed the plaintiff to amend the declaration by setting out the precise dates upon which various contracts and sales had been made, and the point was raised that the declaration as amended misjoined causes of action. The action was trespass on the case in tort and it was claimed that the third count in the declaration was in contract. Even if the point had merit, inasmuch as defendant had failed to specify this ground in its original demurrer, and had pleaded not guilty, it had been waived.
3. WARRANTY—*Case.*—Case is the proper remedy for breach of warranty as to the sale of personal property.
4. DECLARATION—*Counts—Ex Contractu or Ex Delicto.*—The count in a declaration is treated as partaking of the nature of the action. So that if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for a declaration to contain allegations sufficient to support it, either in tort or in assumpsit.
5. ACTIONS—*Joiner of Causes.*—Wherever the causes of action are of the same nature and the same judgment is to be given in all, they may be joined in one declaration.
6. ACTIONS—*Joinder of Causes of Action.*—The first two counts in the declaration in an action for damages by the vendee of personal property against the vendor clearly and plainly in tort alleged deceit, guilty knowledge and fraud. The third count alleged a breach of warranty. Each of the three counts, however, alleged the warranty and its breach, and were plainly intended to include the same general cause of action, and though

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the declaration was inartificially drawn it was so framed that the defendant could not possibly have been deceived as to the subject of the controversy.

Held: That there was no misjoinder.

7. WARRANTY—*Election of Remedies.*—Where an action is based upon a breach of warranty, the purchaser may, if he chooses, waive the tort and sue upon the contract, or waive the contract and sue in tort.

8. AMENDMENT—*Amendment During Trial.*—In an action for damages for fraud and breach of warranty in the sale of defective roofing, the dates of the several sales were each alleged in the declaration under a videlicet. The defendant knew the precise dates of each sale, and after one of its witnesses had supplied those dates the court permitted each count in the declaration to be amended by the insertion of the precise dates. Such amendments were not material, and if they were, were fully authorized by section 3384 of the Code, and the act of March 27, 1914 (Acts 1914, ch. 331, p. 641).

9. AMENDMENTS—*Liberal Construction of Statute.*—Code of 1904, section 3384, and act of March 27, 1914 (Acts 1914, ch. 331, p. 641), are remedial and must be liberally construed to advance the remedy and avoid the evils which they seek to cure.

10. AMENDMENTS—*New Cause of Action.*—In an action for damages by the vendee of personalty against the vendor involving several different sales, the court during trial allowed the declaration to be amended by the addition of the precise dates of each sale. It was objected that because the sales were made on different dates, each sale and warranty constituted a different and new cause of action. As, however, from the institution of the action, the cause of the controversy was clearly and distinctly understood by both parties, and the case made by the amendments was the same case referred to in the declaration, namely, the breach of the vendor's warranty, it was held that there was no force in this objection. It would seem clear that it was the duty of the vendee to join all of his causes of action in one declaration, but if not his duty, it was certainly his right.

11. ACTIONS—*Joinder of Actions.*—A plaintiff may join all his causes of action in one declaration, if in separate suits he can recover on each in the same form of action, although the several causes of action are distinct rights of action so that a judgment in one will not bar a recovery for the other. This rule is, however, subject to the qualification that the causes of action must be in the same right.

12. ACTIONS—*Joinder of Actions.*—Even where the torts are distinct and independent, if they are of the same nature and if the

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same judgment may be given in each, they may, as a general rule, be joined.

13. BREACH OF WARRANTY—*Remedy.*—Either an action on the case sounding in tort or assumpsit will lie for a false warranty.

14. WARRANTY—*Scienter.*—Whether the declaration be in assumpsit or tort it need not aver a scienter. And if the averment be made it need not be proved.

15. APPEAL AND ERROR—*Instructions.*—Where instructions are contradictory and inconsistent, but the erroneous instructions were granted by the court at the instance of the party complaining of the instructions, he can not complain of that as error which could not possibly have injured his cause.

16. TRIAL—*Jury—Instructions.*—In an action for breach of warranty the jury, while considering their verdict, returned to the court room and asked whether or not they were limited in deciding the case of the typewritten guarantee introduced in evidence. The court replied that they were not; that they "must take into consideration the oral evidence, the letters and written guarantee, and to decide from all the evidence what the contract was and a breach of it, if any, and the damages, if any." The typewritten guarantee was only a part of the evidence, but a material part, to be interpreted in the light of the circumstances under which it was given, the letters contemporaneously and subsequently written, the construction put upon it by the parties themselves, and the pertinent oral evidence indicating a breach or lack of breach. As the court could not have made any complete reply to the question without fully reinstructing the jury upon all the questions involved in the case, the reply of the court was not harmful.

17. WARRANTY—*Implied Warranty.*—When one sells an article of personal property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it is to be put.

18. WARRANTY—*Implied Warranty.*—The seller of roofing, knowing that the roofing was intended for buildings required to be water-tight, implied guarantees that such roofing is water-tight.

10. WARRANTY—*Construction.*—Where in the contract of sale of roofing the vendor undertook in case the roof should leak, that he would make repairs, a guaranty is necessarily implied that the roof would not leak.

20. PAROL EVIDENCE—*Warranty.*—Testimony which does not seek to vary or contradict a written guaranty, but which accords with it, showing the attending circumstances, the construction placed upon it by the parties and their subsequent conduct with reference thereto is admissible.

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21. APPEAL AND ERROR—*Harmless Error.*—Since the act of March 27, 1914 (Acts 1914, ch. 331, p. 641), this court should extend the doctrine of harmless error to its logical conclusion, namely, that error is harmless which does not injuriously affect the interests of the party complaining, and that such injury is not presumed, but must affirmatively appear from the record; for that act in simple and unambiguous language directs the courts, at every stage of the proceeding, to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

22. APPEAL AND ERROR—*Harmless Error.*—In this court the doctrine of harmless error has been frequently announced and enforced in many cases where there has been a misdirection of the jury, a refusal to grant proper instructions, where evidence has been illegally admitted, and where there have been mistakes and errors in pleading.

Error to a judgment of the Circuit Court of the city of Richmond, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

O'Flaherty, Fulton & Byrd and *Thos. B. Byrd,* for the plaintiff in error.

Willis B. Smith, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The Standard Paint Company, manufacturer and dealer in a prepared and ready-to-lay roofing, designated by them as "Ruberoid," sold to E. K. Vietor, trading as E. K. Vietor & Co., during the years 1907, 1908 and 1909, a considerable quantity of their roofing to be put on the roofs of his tobacco warehouses and factories, part by the vendor and the residue under its direction. Previous to these contracts

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Vietor had purchased Ruberoid roofing from a dealer in the city of Richmond and not directly from the manufacturer, and had applied it to one of his buildings. This roofing proved very unsatisfactory to him and upon his making complaint, the manufacturer claimed that the reason the roof complained of leaked was because the material, Ruberoid, had not been properly applied, and especially because the sheathing boards upon which the roof was laid had thereafter shrunk because green, that they were of varying widths and uneven. To correct this difficulty the plaintiff in error agreed, for the sum of $500, to supply and apply their water proof felt to this particular roofing, and claimed that this would remove all cause of complaint. About the same time Vietor bought 125 squares more Ruberoid roofing drectly from the Standard Paint Company, with the express understanding, however, that the material was to be applied by the vendor to the roof of another adjacent building of the vendee. In 1908 and in 1909 Vietor bought more Ruberoid roofing for his factory and warehouses, upon similar conditions—that is, that it was to be applied to the roofs by the vendor, or under the direction of its expert agents. The total cost of such roofing was $1,827. It was all sold upon assurances that, if properly applied, the roof would not leak, accompanied by a typewritten paper or guarantee reading thus:

"On payment of invoice, we hereby agree in case of leakage caused by any defect in the Ruberoid roofing or its application from ordinary careful use during the ten years ensuing from ..... (the date when the roof has been completed) to make the necessary repairs at our own expense immediately upon notice of said leakage being given to us.

"But this guarantee shall not be construed to cover damage by fire, tempest or other extraordinary means or causes, and is made with the distinct understanding that the entire

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surface of the roofing is to be given one coat of our Ruberine paint within four (4) years after it is laid. Said coat to consist of one gallon of said Ruberine paint for not more than 200 square feet of surface."

During all this period numerous complaints from time to time were made of the insufficiency of the roofing, and from time to time the vendor sent experts to inspect it, and each time made repairs thereto and stopped leaks therein, until in 1912 it declined to make any further repairs, basing the refusal solely upon the claim that the defects then in the roof were caused by a hailstorm, and that it was not responsible for such damage. The vendee after ample notice to the vendor of his purpose, unless the leaks were stopped, to put a new roof on the building at vendor's expense, did so, at an expense of $2,100, and introduced evidence tending to prove damage to tobacco stored in the warehouses, caused by the leaks in the roofs. There are many other facts brought out in the testimony, and so far as they are material they will be hereafter referred to.

There was a verdict and judgment for $1,417.50 in favor of the vendee, and of that judgment the vendor is here complaining.

There are fourteen bills of exception, but in the petition they are reduced to six assignments of error, which we will consider.

1. There was a demurrer to the original declaration, which was overruled. It is only necessary to say as to this, that section 3272 of the Code makes it plain that this action is without error, because special demurrers have been abolished in Virginia by that statute, and the assignment of grounds of demurrer pointed out no defect not thereby cured.

After the plaintiff had rested and the defendant had introduced one witness, who had been examined in chief and cross-examined, the court allowed the plaintiff to amend

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the declaration by setting out the precise dates upon which the various contracts and sales had been made, and the declaration having been thus amended the point was made that the declaration, as amended, misjoins causes of action.

The action is trespass on the case in tort, and the claim is made that the third count in the declaration is a count in contract and not in tort. The only amendment which was made in the declaration, as above indicated, was the addition of certain dates.

We are clearly of opinion that even if the point has merit, inasmuch as the vendor had failed to specify this ground in the original demurrer, and had pleaded not guilty, it had been waived. 31 Cyc. 731. This, of course, is sufficient to dispose of the point.

However, even if this ground had been specified in the demurrer to the original declaration, it should have been overruled. The third count in the declaration which is complained of alleges a breach of warranty, and in *Trice* v. *Cochran,* 8 Gratt. (49 Va.) 442, 56 Am. Dec. 151, this court determined that case is a proper remedy for breach of warranty as to the sale of personal property.

In *Ferrill* v. *Brewis' Admr.,* 25 Gratt. (66 Va.) 769, this court said: "Another rule of the courts is to treat the count as partaking of the nature of the action. So that if the action is *ex delicto,* the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for the declaration to contain allegations sufficient to support it, either in tort or in assumpsit. And this upon the ground that the same circumstances which show a breach of duty constituting a tortious neglect, show also a breach of promise implied from the consideration of the hire. *Gelston* v. *Burr,* 11 John. (N. Y.), 482.

"Wherever the causes of action are of the same nature and the same judgment is to be given in all, they may be joined in one declaration." 4 Min. Inst. (3d ed.) 1160.

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The only difference between the third count in the declaration and the other two counts, so far as this question is concerned, is, that the first two counts are clearly and plainly in tort, alleging deceit, guilty knowledge and fraud. Each of the three counts, however, also alleges the warranty and its breach, and are plainly intended to include the same general cause of action, and though the declaration is inartificially drawn it is so framed that the defendant could not possibly have been deceived as to the subject of the controversy.

In *Harvey* v. *Skipwith,* 16 Gratt. (57 Va.) 403, an analogous question was thus disposed of by this court: "Each of the counts is a count in case for a tort. The second is confessedly so; and the statements and allegations in respect to the contract of hiring, contained in the first, do not impress upon that count a different character."

The gist of the counts in that case, as in this, is the same. Here the action is based upon a breach of warranty, and, while the complainant may, if he chooses, waive the tort and sue upon contract, he is equally at liberty, where there is a breach of warranty, to sue in tort; and this is what the vendee did in this case.

2. It is claimed that the court erred in permitting the plaintiff to amend the declaration during the progress of the trial.

The circumstances under which the amendment was allowed were, that during the trial the vendor's counsel complained of the erroneous statements in the declaration as to the dates of the various sales. It is not perceived that these were material allegations. The dates were each alleged under a videlicet, and it seems to us that the precise dates were immaterial, except as they might have been necessary to give the defendant notice. In this case the defendant knew the precise dates of each sale, and after one of its witnesses had supplied those dates the court permitted each

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count in the declaration to be amended by the insertion of the precise dates which had just been proved by the vendor's witnesses. As above indicated, we do not think that these were material amendments, but if they were, they are fully authorized by the statute, section 3384 of the Code, which provides:

"If at the trial of any action, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party, shall give judgment according to the right of the case."

In addition to this there is the act approved March 27, 1914 (Acts 1914, ch. 331, p. 641), entitled: "An act to simplify and expedite the administration of justice in this State by the elimination of useless technicalities and vexatious delays and permitting amendments under certain conditions in causes hereafter instituted," which reads as follows:

"Be it enacted by the General Assembly of Virginia, That in any suit or action hereafter instituted, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

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These statutes then authorized the action of the court, even if the amendments had been material.

It is claimed, however, that because the sales were made on different dates, and each sale and warranty constitute a different and new cause of action, that, to permit these amendments, added new, separate and distinct causes of action to each of the counts in the original declaration.

In *New River Mineral Co.* v. *Painter,* 100 Va. 507, 42 S. E. 300, the plaintiff was allowed to amend the declaration, which charged that a lawful act had been negligently done, by adding a count which alleged that the act itself was unlawful, and the rule is stated thus:

"Counsel have not cited, nor have we in our investigation found, any decision of this court which indicates what amendments of the declaration the court may allow after appearance; but there are many decisions upon the question in other jurisdiction. The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action different from that declared on, and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases, the original and amended declarations and the count or counts in each are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts, and of mak-

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ing amendments to a declaration. *Snyder* v. *Harper*, 24 W. Va. 206, 211; *Smith* v. *Palmer*, 6 Cush. (Mass.), 513, 519; *Yost* v. *Ely*, 23 Pa. 327, 331."

The amendment allowed here was strictly within the rule.

From the institution of this action, the cause of the controversy was clearly and distinctly understood by both parties to it. It was the subject of numerous interviews between them and of voluminous correspondence, and the case made by the amendments was the same case referred to in the declaration, namely, the breach of the vendor's warranty as to the roofing material referred to. It would seem clear that it was the duty of the vendee to join all of his causes of action in one declaration, but certainly, if it was not his duty, it was his right to do so.

In 23 Cyc. 395, this is said: "As a general rule it may be stated, that a plaintiff may join all his causes of action in one declaration, if in separate suits he can recover on each in the same form of action, although the several causes of action are distinct rights of action so that a judgment in one will not bar a recovery for the other. This rule is, however, subject to the qualification that the causes of action must be in the same right." This statement of the law is well supported by the authorities there cited.

In this case, if the vendee had vexed the vendor with several suits, he would have been the subject of criticism. Even where the torts are distinct and independent, if they are of the same nature and if the same judgment may be given in each, they may, as a general rule, be joined. 23 Cyc. 398; *Fisher* v. *Seaboard Air Line R. Co.*, 102 Va. 371, 46 S. E. 381, 1 Ann. Cas. 622. Here, the torts complained of grew out of a continuous course of dealing between the same parties with reference to one article of commerce, the roofing, and its application to the factory and warehouses of the vendee.

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The statutes above quoted are remedial and must be liberally construed to advance the remedy and avoid the evils which they seek to cure. *McKee* v. *Bunting McNeal R. E. Co.*, 114 Va. 639, 77 S. E. 518; *Langhorne* v. *Richmond City R. Co.*, 91 Va. 367, 22 S. E. 357; *Norfolk & Western Ry. Co.* v. *Perdue*, 117 Va. 117, 83 S. E. 1058.

3. It is claimed that the jury was misdirected. This assignment is based upon the theory that because the first two counts of the declaration alleged a false and fraudulent warranty and that it was made with knowledge of such falsity, such allegation must be proved. The court gave to the jury certain instructions based upon that theory, it also gave them instructions based upon the theory that such guilty knowledge was not necessary in order to support a recovery.

In *Trice* v. *Cochran*, 8 Gratt. (49 Va.) 442, 56 Am. Dec. 151, this court expressly decided that it is not necessary to allege the defendant's knowledge, and that if alleged it is not necessary to prove it. And in *Schuchardt* v. *Allen*, 1 Wall. (68 U. S.) 360, 17 L. Ed. 645, this is stated: "The ancient remedy for a false warranty was an action on the case sounding in tort. *Stuart* v. *Wilkins* (1 Douglas 18); *Williamson* v. *Allison* (2 East, 447). The remedy by assumpsit is comparatively of modern introduction. In *Williamson* v. *Allison*, Lord Ellenborough said it had 'not prevailed generally above forty years.' In *Stuart* v. *Wilkins*, Lord Mansfield regarded it as a novelty, and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort it need not aver a *scienter*. And if the averment be made it need not be proved." *Gresham* v. *Postan*, 2 Carrington & Payne, 540; *Brown* v. *Edgington*, 2 Man. & Granger, 279; *Holman* v. *Dord*, 12 Barb. S. C. 336; *House* v. *Fort*, 4 Blackf. 293; *Trice* v. *Cochran*, *supra*; *Lassiter* v. *Ward*, 11 Ired. 443.

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It is true that the instructions are contradictory and inconsistent, but inasmuch as the erroneous instructions are those which were granted by the court at the instance of plaintiff in error, it cannot now complain of that as error, which could not possibly have injured its cause. The danger was the injustice it might have done to the defendant in error.

Among the assignments is this: That the court erred in making a reply to the jury, who, while considering of their verdict, returned into the court room and asked the following question: "Whether or not they were limited in deciding this case to the typewritten guarantee introduced in evidence and marked Exhibit 2?" In reply to this the court said: "They are not, and must take into consideration the oral evidence, the letters and written guarantees and to decide from all the evidence what the contract was and a breach of it, if any, and the damages, if any."

If the case had depended entirely upon the typewritten guarantee, then this reply would have been harmful, but under the evidence in this case, if the court had told the jury that they were limited to the typewritten guarantee, that would certainly have been misleading. The typewritten guarantee was only one part of the evidence—a very material part, it is true; but it had to be interpreted in the light of the circumstances under which it was given, the letters contemporaneously and subsequently written, the construction put upon it by the parties themselves, and the pertinent oral evidence indicating a breach or lack of breach. So it is difficult to understand how the court could have made any complete reply to the question without fully re-instructing the jury upon all of the questions involved in the case. They had already been instructed in writing, and we must assume that the jury considered not only this reply which is complained of, but the other instructions which they had previously received.

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We find no reversible error in the instructions given.

4. The refusal of the court to grant three instructions asked for by the plaintiff in error is assigned as error. One of the instructions refused, No. 5, is based upon the claim that the written guarantee hereinbefore quoted should have been pleaded in those precise words in the declaration, and the liability thereby incurred always expressed in the precise words of that paper.

It is perfectly well settled that when one sells an article of personal property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it is to be put (*Gerst* v. *Jones*, 32 Gratt. [73 Va.] 518, 34 Am. Rep. 773); and it seems clear that, notwithstanding the written paper, inasmuch as it is perfectly certain that the vendor knew that the roofing was intended for buildings required to be water-tight, it may be fairly inferred that there was this implied guarantee. It is not necessary, however, to rely upon the guarantee implied by law in such cases, for a fair construction of the paper referred to necessarily implies such a guarantee. The paper embodies not the specific words of the guarantee that the roof should be water-tight, but does specify the obligation of the vendor in case the roof should leak, and clearly defines its duty in such event. The very fact, however, that it makes definite promises and imposes certain specific duties upon the vendor in case the roof should leak, creates the necessary implication in the paper itself that the vendor guaranteed that the roof would not leak. The declaration is framed upon the theory that there was this guarantee that the roof would be water-tight, and a great deal of the controversy in this case grows out of the fact that the vendor appeared to claim that the roof was never so guaranteed. That both parties to the controversy understood that the roofing was sold upon a guarantee that if properly applied it would be water-tight, is

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perfectly apparent from the contemporaneous letters and evidence on both sides. The court took the same view, and instruction 5 was rightly refused because the vendee's rights under the contract could not be limited in the way it was sought to limit them.

The other instructions refused were sufficiently covered by the instructions which were granted, ten in number, and they sufficiently protected every legal right of the vendor.

5. What has been said is sufficient to indicate our view as to the several motions to exclude all the correspondence between the parties, and indeed substantially all the evidence introduced in support of the vendee's claim. This testimony did not seek to vary or contradict the written guaranty. On the contrary, such evidence accorded with it, showed the attending circumstances, the construction placed upon it by the parties and their subsequent conduct with reference thereto. The motions were properly overruled.

6. It is claimed that the verdict is contrary to the law and the evidence.

It sufficiently appears that the vendee bought the roofing material for the purpose of roofing in a certain tobacco factory and appurtenent warehouses, which were required to be water-tight, and that the vendor knew all the surrounding circumstances and the necessities of the vendee, and had the roofing applied to the roofs under its own supervision and direction. The evidence is ample to show that the roofs gave a great deal of trouble and leaked after almost every rainfall, and that from time to time for nearly five years the vendor sent its agents to have the leaks stopped, and that finally it refused to pay any more attention to the vendee's claims and said that a part of the roof had been damaged by a hailstorm, and that for this damage it was not responsible. There is no sufficient explanation of why part only of the roofing was thus damaged and the evidence is conflicting on this point.

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Since the act of March 27, 1914, *supra*, it is apparent that this court should extend the doctrine of harmless error to its logical conclusion, namely, that error is harmless which does not injuriously affect the interests of the party complaining, and that such injury is not presumed but must affirmatively appear from the record; for that act, in simple and unambiguous language directs the courts, at every stage of the proceeding, to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In this court the doctrine of harmless error has been frequently announced and enforced in many cases where there has been a misdirection of the jury, a refusal to grant proper instructions, where evidence has been illegally admitted, and where there have been mistakes and errors in pleading.

This case has been fairly tried upon a cause of action clearly indicated in the declaration, about the facts of which the defendant was as well informed as the plaintiff; they have submitted their controversy to a jury upon all the evidence which they themselves deemed pertinent; it appears that all of the substantial rights of the parties have been safeguarded; and we find no prejudicial error in the proceedings.

The judgment will, therefore, be affirmed.

Affirmed.

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Richmond.

TOWN OF VIRGINIA BEACH v. OGLE.

March 15, 1917.

1. STREETS AND SIDEWALKS—*Acceptance of Street by Town—Question for Jury.*—A survey and map of an unincorporated town was duly recorded and expressly referred to in the act of incorporation of the town thus answering the statutory requirements of Virginia Code 1904, section 1014. An action was brought by plaintiff for personal injuries caused by a defective board walk. The contention on behalf of the town was that the point at which the accident happened was originally an approach built by a railroad to a pleasure pavilion, and not a public street. The contention of the plaintiff was that the board walk was an extension of one of the original streets of the town, and that it had long been constantly used by the public and accepted and maintained by the town as a street. It appeared that the town did some repairing to the sidewalk in question. The case was fairly submitted upon this simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff, and their verdict was approved by the trial court.

Held: That the verdict should not be disturbed.

Error to a judgment of the Circuit Court of Princess Anne county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

A. Johnston Ackiss, for the plaintiff in error.

J. Edward Cole, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

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The judgment under review was recovered by Mrs. Ogle against the town of Virginia Beach for personal injuries caused by a defective board walk on a public street of the town.

Virginia Beach was incorporated March 6, 1906 (Acts 1906, p. 80), but long prior to that time the town had been laid off into lots and streets and had been built up and occupied as an unincorporated town known as "Virginia Beach." The survey and map, called the "Hughes Map," was duly recorded and is expressly referred to in the act of incorporation, and answers the statutory requirement that, "The council of every city and town shall (unless it has already been done) cause to be made a survey and plan of such city or town, showing distinctly each lot, public street and alley therein, the size and number of the lots, and the width of the streets and alleys, with such explanations and remarks as may be deemed proper. * * *" Va. Code 1904, sec. 1014.

The town is a seaside resort connected with the city of Norfolk by the Norfolk Southern Railroad. The contention on behalf of the town is that the point at which the accident happened was originally an approach built by the railroad to a pleasure pavilion erected by the company for the accommodation of excursionists and passengers traveling over its line, but at the time of the accident a new excursion and amusement pavilion had been constructed by the company to which its patrons were taken by train; and that the use of the old pavilion had been discontinued.

The opposing contention of the plaintiff is that this board walk was an extension of Arkansas avenue, or Tenth street, one of the original streets of the town, and connected it with the board walk along the water front; and that it had long been constantly used by the public and accepted and maintained by the town as a street.

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It is true exception was taken to the giving and refusal of instructions, but the case, at last, was fairly submitted upon a simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff. Their verdict was approved by the trial court, and its ruling in the matter of instructions does not, we think, constitute reversible error.

The judgment must, therefore, be affirmed.

SIMS, J., dissenting:

The vital point in this case is whether there was any duty resting upon the appellant to keep the sidewalk in repair when the accident occurred. The alleged breach of such duty is the basis of the action.

It does not necessarily follow that such duty existed if the street in question, whereon the said sidewalk was located, had been accepted by the appellant as a public street (as when the duty in question exists where there has been such acceptance, it is not necessary in this case to inquire), but the authorities are in accord in holding, and we do not understand that counsel for appellee controverts such position, that such duty did not exist unless such street had been accepted as a public street by the appellant.

Now such acceptance by a town may be express, that is by resolution of its proper corporate authority, or such acceptance may be implied from the acts of those exercising the corporate authority. *Harris' Case,* 20 Gratt. (61 Va.) 833.

The rule in Virginia as to highways is different. As to these, before the county can be charged with the duty to repair, etc., there must be evidence of an express acceptance by the proper authority. *Kelly's Case,* 8 Gratt. (49 Va.) 636. This rule, however, is not in accord with the weight of authority in other States. See note 27 Am. Dec. 563-6.

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There is a difference between cases where the acceptance is beneficial from those where it entails a burden with respect to the proof of acceptance required. In the latter class of cases, the rule in Virginia seems to be that mere user by the public of the *locus in quo* will not of itself constitute an acceptance—that is, an acceptance will not be implied therefrom, unless such user be of a character and for the length of time corresponding with the requirements of the statute of limitations applicable to real actions in the jurisdiction where the question arises. *Harris' Case, supra; Winchester* v. *Carroll*, 99 Va. 727, 739, 40 S. E. 37; and authorities cited in those cases; Elliott on Roads and Streets, sec. 171, note.

The user by the public is not relied on in this case, as we understand it, to raise the implication of acceptance by the town for the reason that the latter was not incorporated until 1906, and sufficient period has not elapsed so that such implication could possibly arise.

Appellee contends, as we understand the position of counsel, that said acceptance by appellant was both (a) express and (b) implied, for the reason stated belonw. We will consider these positions in their order as stated.

a. Was there an express acceptance of said street by appellant?

Appellee, in the brief of counsel for her, bases her position that the street was expressly accepted by the town as a public street upon the claim that such street "was adopted" as a public street by the act of assembly by which appellant was incorporated. In oral argument of such counsel it was also urged that by virtue of section 1014 of the Code of Virginia (Pollard's Code, 1904), the plat referred to in the said act of incorporation, known as the Hughes map, is *prima facie* evidence of the existence of such public street, and hence of its acceptance by appellant as such. The majority opinion sustains the latter position. In this, for reasons stated below, I cannot concur.

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The act of incorporation referred to, so far as pertinent, is as follows:

"Chap. 76.—An act to incorporate the town of Virginia Beach, in the county of Princess Anne, Virginia.

"Approved March 6, 1906.

"1. Be it enacted by the General Assembly of Virginia, That the following described territory in Princess Anne county be, and is hereby, incorporated as a town, to be known as Virginia Beach.

"2. Beginning at a point in the county of Princess Anne, on the Atlantic ocean, where the Chautauqua by the sea and W. H. Hall's line adjoin; thence running northerly along Atlantic ocean to Twenty-sixth street to Linkhorn bay; thence running southerly along Linkhorn bay and following the westerly boundary of the Virginia Beach Development Company's property until it strikes Parks avenue, as shown on the plat of Virginia Beach, recorded with the deed to Robert M. Hughes, duly recorded in the clerk's office of Princess Anne circuit court, July twenty-first, eighteen hundred and eighty-seven; thence running south down the center of Parks avenue through the property now or formerly the Atlantic Investment Company until it strikes the lines of the Virginia Beach Development Company's property; thence following the boundary of the Virginia Beach Development Company's property to a cove in Lake Rudee; thence running eastwardly along the southern boundary of the Virginia Beach Development Company's property to a point in Hall's line; thence eastwardly in a straight line to the point of beginning."

The plat referred to in this act is not of the territory thereby incorporated as the "Town of Virginia Beach," but of a larger territory theretofore designated by its private owners as "Virginia Beach." The reference in the act of assembly to the plat and streets thereon mentioned is manifestly for the sole purpose of designating the outside bound-

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ary of the territory incorporated; not for the purpose of evidencing the acceptance of any streets as public streets.

Moreover, Arkansas avenue, or Tenth street, the street on which the accident occurred, which is the basis of the action in the instant case, is not mentioned in said act of incorporation.

Section 1014 of the Code of Virginia (Pollard's Code, 1904) is as follows:

"The council of every city and town shall (unless it has already been done) cause to be made a survey and plan of such city or town, showing distinctly each lot, public street, and alley therein, the size and number of the lots, and the width of the streets and alleys, with such explanation or remarks as they may deem proper. The said plan, when approved by the council, shall be entered in some one of their books, and afterwards recorded, in the case of a city, in the clerk's office of the corporation or hustings court of such city, and in case of a town, in the clerk's office of the county in which said town or the greater part thereof is, and when so recorded shall remain in said office. Said plan shall be *prima facie* evidence of the boundaries of the said lots, streets, and alleys."

It is manifest from the reading of this statute that before any plat can have the effect as evidence as prescribed thereby it must not only have been made, as the majority opinion assumes as sufficient, but must also be "approved by the council, * * * entered in some one of the books" of the town, "and afterwards recorded * * * in the clerk's office of the county in which said town or the greater part thereof is * * *" None of these statutory requirements appear in the instant case to be met by the plat relied on by appellee. Hence, this statute does not aid appellee in proof of the acceptance of the street in question as a public street by the appellant.

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Therefore, there was no express acceptance of the street in question in the instant case.

b. Was there an implied acceptance of said street by appellant?

The only testimony before the jury of acts of appellant bearing on this question tended to show the following state of facts:

That the sidewalk in question was originally built by private parties before the town was incorporated; that it was kept in repair by the railroad company up until it moved its pavilion near by which this sidewalk passed, which occurred about two years before the accident which was the basis of the action; and that appellant did some repairing to the sidewalk in question—when, the character or amount, or under what circumstances, is not stated by the two witnesses who testify to this fact, nor does this information otherwise appear in evidence.

Further, a former town sergeant testifies that the mayor of the town on one occasion refused to give a concession to a private person for the use of the street on the side of which the sidewalk in question was located for some private purpose, the witness stating that in this the mayor acted under authority of the town council, and that latter decided that this was a public street and that it could not rent it out. Appellant objected to this parol testimony and called for record evidence of such alleged action of the town council.

Considering the matter of the alleged action of the town council referred to in the last paragraph, first: It is clear that the minutes of the meeting of the town council at the time of its alleged action was the best evidence of the alleged fact. Neither such record nor any copy from it was produced. No foundation was laid for introduction of secondary evidence on the subject. The parol testimony as to the

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alleged action of the town council was, therefore, clearly inadmissible and must be regarded as not before the jury.

Coming now to whether the acts testified to of repairing the sidewalk done by appellant and of the mayor refusing the concession for use of the street alongside such walk for private purposes above referred to:

If the proof of such acts had shown that they were of a character inconsistent with any other position on the part of the town (appellant) than that it had accepted said street, it would have been sufficient to have warranted the jury in implying the fact that such acceptance had taken place. The testimony as introduced was far too meagre and indefinite to measure up to such requirement.

The testimony on this subject should furnish some definite evidence that the act relied on was in fact an act which was authorized by the proper corporate authority.

"A dedication of land for streets may be complete without any act of acceptance on the part of the public, but in order to charge the municipality with the duty to repair or make it liable for injuries there must be an acceptance of the dedication. It may be express or implied, and if implied by repairing, it must be repaired by the authority which has the legal right to adopt it." 2 Dillon on Mun. Corp., 642.

It is true two witnesses in the instant case testified that there was repairing done by appellant. But it was a conclusion of fact inadmissible as testimony upon objection being made, as was made, to its admissibility. (See for rule on this subject *Shenandoah Valley, &c. Co.* v. *Murray*, 91 S. E. 740, decided at this term of this court, 13 Va. App. 543). This testimony, to have been admissible, should have been of such specific character as to who did the repairing, when, under what circumstances, and what was the nature of the repairs as to have furnished some definite evidence that it was done directly or indirectly by the proper corporate authority.

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The mere act of a surveyor repairing streets is not sufficient in itself to show acceptance. *State* v. *Bradbury*, 40 Me. 154-7.

There must be something more than an occasional act of repairing a street to constitute an acceptance. *Ogle* v. *Cumberland*, 90 Md. 59, 44 Atl. 1015.

For the foregoing reasons, I do not think that there was any evidence before the jury to sustain a finding that a duty rested on the appellant to repair the sidewalk in question, and hence the verdict should be set aside and a new trial granted.

Affirmed.

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Syllabus.

Richmond.

WASHINGTON AND OLD DOMINION RAILWAY v. WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY.

June 8, 1916.

Reheard March 15, 1917.

Absent, Cardwell, J.

1. CONTRACTS — *Construction — Special Enumeration Followed by General Words—Ejusdem Generis.*—Under the *ejusdem generis* rule, applicable to the construction of written instruments, if a contract specifically enumerating losses from which a party is to be exempt is followed by words of general classification, the general words will be construed to mean other losses of the same kind as those enumerated.
2. CONTRACTS—*Construction—Ejusdem Generis Rule.*—The *ejusdem generis* rule is invoked only for the purpose of ascertaining the intent and meaning of the language under consideration, and should not be applied so as to do violence to the language employed in the instrument.
3. CONTRACTS — *Construction — Case in Judgment — Application of Ejusdem Generis Rule.*—In the case in judgment, the contract provides that the defendant "shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages."

   Held: The words "or by any other cause which is unavoidable or beyond its reasonable control" should be restricted to causes of like nature with those enumerated, but the clause "or, in any event, for consequential damages" should not be so restricted, and the defendant should be exempt from "consequential damages" whether of like nature or not.
4. DAMAGES—*What are "Consequential Damages"—Case in Judgment.*—Consequential damages arise when certain special facts are known to the defendant at the time of the contract which would give notice to him that a breach of the contract would result in an otherwise unexpected loss. If the special circum-

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stances are communicated to the defendant the damages resulting from the breach of such contract might reasonably be presumed to be contemplated by the parties and may be recovered by the plaintiff unless there is an agreement between the parties with reference to the damages. In the case in judgment, the agreement between the parties exempted the defendant from liability for such damages.

5. INTEREST—*When Allowed—Actions on Contracts.*—In Minor's Inst., Vol. 4, part 1 (ed. 1878), p. 739, it is said that "when the action is founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. It is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract."

ON REHEARING.

6. DAMAGES—*What are "Consequential Damages."*—Consequential damage is such damage, loss, or injury as does not flow directly or immediately from the act of the party, but only from some of the consequences or results of such act. Consequential damage must in fact and effect remain the same, whether in the contemplation of either or both parties or not. It is, however, only when such damages are contemplated by both parties that they are recoverable. This mutual contemplation makes them recoverable, but does not change their character from consequential to direct damages. If the consequences are known, or such as ought to be known, to the seller when the contract is made, he will be liable unless he provides against them in the contract. If they are not such as he knows, or ought to know, will follow a breach, he will not be liable. It would, therefore, be vain and useless to contract against liability "in any event for consequential damages," unless the term is to be construed to refer to consequences in contemplation when the contract is made. Hence, it must follow from the foregoing postulate that the mere fact that consequential damage might result from delay in deliveries of the articles sold was contemplated by the parties at the date of the contract could not *ipso facto* convert such damage into direct damage; and any argument based upon that false premise cannot be sound.

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7. INTEREST—*When Allowed—Actions on Contract.*—Section 3390 of the Code of Virginia is as follows: "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action, whether on contract or tort, the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which interest shall commence." The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon the general assumpsit. Under all the circumstances of the case, the statute above quoted applied, and the jury had the right, in their discretion, to fix the date from which the interest should begin to run. Consequently, a peremptory instruction of the lower court to the jury that if they found for the plaintiff they should allow interest from the time the plaintiff's demand accrued, under the terms of the contract, was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error.

8. APPEAL AND ERROR—*Remittitur.*—Where the lower court erred in peremptorily directing the jury to allow interest to plaintiff from the time the plaintiff's demand accrued, where under section 3390 of the Code such allowance of interest was discretionary with the jury, the appellate court may affirm the judgment on condition that plaintiff relinquish the interest upon the principal sum found by the jury.

Error to a judgment of the Circuit Court of Loudoun county, in an action of assumpsit. Judgment for the plaintiff. Defendant assigns error.

Affirmed in Part and Reversed in Part.

The opinion states the case.

C. E. Nicol, W. J. Lambert, C. V. Meredith, J. J. Darlington and *T. S. Martin,* for the plaintiff in error.

John J. Jackson, E. E. Garrett and *Eppa Hunton, Jr.,* for the defendant in error.

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KEITH, P., delivered the opinion of the court.

The Westinghouse Electric and Manufacturing Company and the Washington and Old Dominion Railway entered into a contract, dated April 12, 1912, by which the Electric Company agreed to furnish the equipment to electrify the road of the Washington and Old Dominion Railway which extends from the city of Washington to Bluemont, in Loudoun county, Virginia.

The Westinghouse company delivered at various times subsequent to the 12th of April, 1912, the equipment necessary for the electrification of the railway between the points named, and demanded payment of the balance due upon its account, amounting to $81,652.19, which the railway company refused to pay, and thereupon the Westinghouse company brought an action of trespass on the case in asssumpsit and filed its declaration, which contains the counts common to that form of action and a special count, and with the declaration filed an itemized account of its claim. To this action the defendant railway company pleaded non assumpsit and offsets, and with its plea of offsets filed an itemized account amounting to $87,227.69. On all of these pleas issue was joined and the jury found in favor of the plaintiff for the whole amount of its claim, with interest at the rate of five *per cent.* from May 1, 1913, subject to a credit of $791.13 as of that date, upon which judgment was entered, and upon the application of the railway company a writ of error was awarded which brings the case before us for review.

The plaintiff having offered evidence which tended to prove each item of its claim, the defendant, in order to maintain the issue upon its part, offered evidence tending to prove that the plaintiff, both prior to and at the time of the making of the contract, was informed of and knew the

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following facts, and that it entered into the contract with that knowledge brought directly to its attention:

1. That the defendant was the lessee of the Bluemont division line of the Southern Railway, under a lease which required it to operate that line on and after July 1, 1912;

2. That the lease, by its terms, was liable to forfeiture if the defendant failed to do so, and that the defendant was further under bond to its lessees in the penalty of $100,000, conditioned upon the faithful performance of its undertaking;

3. That a responsible railroad constructor had entered into a binding contract with the defendant for performing all the work of electrifying its line ready for operation by electricity after July 1, 1912, conditioned only upon delivery by the plaintiff of the materials covered by its contract, and that the said work could and would have been completed in time but for the plaintiff's failure to deliver its materials within the contract time;

4. That the defendant had no steam locomotives, motive power, cars or equipment, except cars and equipment for operating by electricity, and was relying upon the plaintiff's performance of its contract within the delivery dates fixed by the contract, to enable it to carry out its obligation to operate the line on and after July 1, 1912;

5. That by reason of the plaintiff's said failure to deliver promptly, the contractor for construction was unable to maintain his working organization, and was subject to other delays, which, without fault or want of due and reasonable diligence and effort upon his part, rendered him unable to complete performance of his said contract with the defendant until December 27, 1912;

6. That by reason of the plaintiff's said delays in deliveries, exclusively, the defendant was compelled, without any other alternative, to hire other motive power and equipment to comply with its necessity and duty to commence to

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operate its said line on July 1st, and to continue to operate it thereafter until its electrification was so as aforesaid completed, namely, until December 27, 1912, at greatly increased expense, and also with greatly diminished revenue than would have been incurred and realized, respectively, had it been enabled to operate it electrically during that period, as, but for the plaintiff's said default, it would have been;

7. That the materials which the plaintiff so contracted to deliver within the said contract dates, and which were necessary to the electrification of the defendant's line within said period, were materials which could not be bought in the open market in time to avoid the necessity of hiring other motive power, namely, steam motive power for the operation of the line beginning on July 1st.

This evidence was offered for the purpose of showing that this contract was entered into by both the plaintiff and the defendant with knowledge on the plaintiff's part of each of these facts, and therefore, in fact and in contemplation also, by operation and construction of law, of the class of damages which resulted, and which are referred to in the prayers as damages, which both parties then knew would result from its failure to comply with its contract, they are not consequential damages within the meaning of the language of this contract, especially in view of its erased provision that acceptance should not waive delay, and therefore that class of damages is recoverable.

The court refused to permit evidence to be introduced in proof of any of the enumerated facts.

By article 6 of the contract it is provided that the Westinghouse company "shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages."

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Before we come to consider what are to be deemed consequential damages, as the phrase is used in this contract, it is well to observe that the railway company insist that, under the canon of construction known as the *ejusdem generis* rule, which is to the effect that general terms of a statute or contract are subordinated by the sense of the preceding and connected particulars, the provision under consideration having enumerated losses by specific causes for which the company would not be responsible, such as detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, which were followed by the general term, "consequential damages," the consequential damages are to be limited to such as are of like kind with those causes of loss which had been specifically enumerated.

We do not doubt the rule invoked is established by authority, but we do not think that it influences the construction of the term of the contract under consideration to the advantage of the plaintiff in error. It will be observed that after the enumeration of the causes of damage for which the Westinghouse company is not to be held liable, concluding with "insurrection or riot," there follows the phrase, "or by any other cause which is unavoidable or beyond its reasonable control." That general phrase is, we think, subject to the rule of construction invoked, and if there were any contention with respect to that provision, it should be confined to damages flowing from like causes to those enumerated; but the contract goes further and says, "or, in any event, for consequential damages," making use of a technical phrase, which has an ascertained and definite meaning. The *ejusdem generis* rule is invoked only for the purpose of ascertaining the intent and meaning of the language under consideration, and should not be applied so as to do violence to the language employed in the instrument under consideration. We think it plain that the Westinghouse

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company was to be exonerated from any responsibility or liability for loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, as specifically enumerated, or by any other cause which is unavoidable or beyond its reasonable control, confining the operation of this general language to causes of a like kind with those specifically enumerated, and then as an independent proposition, accentuated by the use of the phrase "in any event", "from consequential damages."

There were two items in the bill of offsets, one for $6,970.40, and the other for $2,765.05 which the circuit court held were not consequential damages and could properly be set off against the plaintiff's demand, but these two items counsel for the plaintiff in error, for reasons satisfactory to them and doubtless to their client, refused to support by testimony.

Damages are either direct or consequential. Sutherland on Damages, Vol. 1, section 14, speaking of direct damages says that the term includes "all such injurious consequences as proceed immediately from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegations of damages in the declaration, but also other direct effects which have in the particular instance naturally resulted and must be alleged specially to be recovered for."

Consequential damages arise when certain special facts are known to the defendant at the time of the contract which would give notice to him that a breach of the contract would result in an otherwise unexpected loss. If the special circumstances are communicated to the defendant the damages resulting from the breach of such contract might reasonably be presumed to be contemplated by the parties and may be recovered by the plaintiff unless there is an agreement between the parties with reference to the damages.

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Sedgwick on Damages, section 141, discussing the difference between damages arising from tort and from breach of contract, says that, "The duty to refrain from a tort is a duty which no one can avoid; it is imposed upon him by the law, and no act of his can increase or diminish it. But in entering into a contract he is undertaking a duty which the law does not require of him; its assumption is purely voluntary, and fairness requires that he should be able to understand the extent of the obligation he undertakes. A just rule, therefore, would put upon a person who commits a tort the risk of all proximate consequences of his wrong, but upon one who breaks a contract such risk as he could have foreseen when he undertook the duty; and this appears to be the conclusion of the law. * * *

"In determining the amount of damages due for breach of contract or for other assumed obligation, the test is whether the damage is natural, or within the actual or potential contemplation of the parties at the time the obligation was assumed. If the damage in question was not natural, then there can be no recovery for it. To justify recovery, it must be both natural and proximate."

In section 143 it is stated: "In actions of tort, where the wrongdoer voluntarily or negligently did an act which in itself was illegal, he is responsible for all the proximate consequences of the wrongful act, whether the consequences are natural or not. And even when the tort is accomplished through a failure to perform a specific duty, as by the failure of a pubic service company to supply guards or furnish police protection, the rule is the same. Where, however, an action, though in form based on a tort, really amounts to an action for breach of a contract, the rule in this respect is the same as in case of breach of contract; as for instance in case of an action against a carrier for delay in the delivery of goods." The author then proceeds to discuss the rule in the case of *Hadley* v. *Baxendale*, 9

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Ex. 341, 23 L. J. Ex. 179; 18 Jur. 358; 26 Eng. L. & Eq. 398; and in a note to section 144 (of Sedgwick) it is said that "so entirely is the later law founded on this case, that the great body of cases since decided involving the measure of damages for breach of contract, resolve themselves into a continuous commentary upon it." And this seems to be true as well of American as of English cases.

In that case the plaintiffs were the owners of a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer, to serve as a model for a new one. On making the contract the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery; the shaft was kept back in consequence; and in an action for breach of contract they claimed, as specific damages, the loss of profits while the mill was kept idle. It was held that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But as it did not appear he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent. The court said:

"We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstance under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the

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breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were widely unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

A case very similar to that of *Hadley* v. *Baxendale* is that of *Swift River Co.* v. *Fitchburg Railroad Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288. That was an action against a railroad company for failure to deliver, with reasonable dispatch, two steel boilers and fittings and castings. The defendant admitted that the delay in delivery was caused by its negligence in first sending the merchandise to a wrong address. The court held, that "if there is no evidence which fairly tends to show that the defendant had notice of the circumstances attending the ordering of the boilers, or of the nature of the plaintiff's business, and the use to which the boilers were to be put, or of the fact that the plaintiff's mill was stopped or to be stopped for the purpose of making a change in boilers, and such notice cannot be inferred fairly from the character of the property, or from the fact that the old boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped, the plain-

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tiff is not entitled to damages, as they could not have been within the contemplation of the parties when the goods were received for transportation, and were not the proximate result of the delay on the defendant's part, except in the single particular of cash expended for telegrams, time and expenses looking for boilers, and team for hauling expected boilers."

The effect of that decision is that, under the facts of that case the loss was not the proximate result of the delay, and the damages were not, therefore, direct, but consequential, and not being within the contemplation of the parties, there being no evidence which tended to show that the defendant had notice of the circumstances attending the order of the boilers and the nature of the plaintiff's business and the use to which they were to be put, there could be no recovery.

In the case under consideration, we are of opinion that the damages claimed by way of set-off were not direct but consequential, but that inasmuch as the evidence excluded tended to prove that the Westinghouse company had notice of all the facts necessary to establish its liability for the damages claimed, as being within the contemplation of the parties, the evidence should have been admitted but for the contract which excludes its liability for all consequential damages.

The cases upon the subject are without number, and this opinion could be indefinitely prolonged in their discussion, but the principles which control are, we think, established by the authorities which we have cited.

Counsel for defendant in error properly admit that but for the operation of the contract entered into between the parties, which excludes liability for consequential damages, the evidence objected to should have been admitted, but we are of opinion that the case is covered by the contract and controlled by it, and that, therefore, there was no error in the exclusion of the testimony by the circuit court.

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There is a difference between the parties as to when the contract between them became operative. On behalf of the railway company it is contended that it took effect on the 12th of April, 1912, while the Westinghouse company insist that it only took effect from the date when it was ratified by an executive officer of the Westinghouse company; but in the view we have taken of this case, we deem it unnecessary to pass upon this question.

Counsel for the petitioner assign as error the allowance of interest upon the verdict.

In Minor's Inst., Vol. 4, part 1 (ed. 1878), p. 739, it is said that "when the action is founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. And it is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract."

To the same effect see *Chapman's Admrs.* v. *Shepherd's Admr.*, 24 Gratt. (65 Va.) 383; *Kent's Admr.* v. *Kent's Admr.*, 26 Gratt. (69 Va.) 845; *Roberts' Admr.* v. *Cocke*, 28 Gratt. (69 Va.) 217.

Upon the whole case, we are of opinion that there is no error in the judgment complained of, which is affirmed.

Affirmed.

REHEARD MARCH 15, 1917.

WHITTLE, P., delivered the opinion of the court.

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This case is before us upon a rehearing of the judgment of this court pronounced at the June term, 1916, 98 S. E. 131. At the first hearing three principal questions were discussed, and the same questions are now submitted for our consideration. They are these:

I. Whether the true contract between the parties is alone evidenced by the printed draft bearing date April 12, 1912, or by that contract with the modifications proposed in the letter of May 31, 1912, written by the Westinghouse, &c. Co., plaintiff below, to the railway company, the defendant.

II. The correctness of the ruling of the trial court in excluding the parol evidence offered by the defendant in support of certain items of set-off filed with its plea. And

III. The correctness of the court's instruction in regard to the allowance of interest.

At the former hearing it was not deemed necessary to pass upon question I, since the decision was mainly rested on the construction of certain stipulations in the contract of April 12, 1912, which were not affected by the letter of May 31, 1912. Inasmuch, therefore, as we are disposed to adhere to the former decision of this court upon that branch of the controversy, it is not thought necessary to pass upon question I.

Clause 6 of the printed contract was originally as follows:

"The company shall not be held responsible for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages, and the receipt of the apparatus by the purchaser upon its delivery shall constitute a waiver of all claims for loss or damage due to delay; * * *"

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But at the instance of the defendant the following stipulation was erased: "and the receipt of the apparatus by the purchaser upon its delivery shall constitute a waiver of all claims for loss or damages due to delay."

The circuit court was of opinion that all items of set-off filed with the plea, "except perhaps the items for extra cost of overhead construction and extra cost of engineering," constituted consequential damages for which by the express terms of clause 6 of the contract the plaintiff in no event was to be held liable.

The printed contract also contained the following agreement:

"All previous communications between the parties hereto, either verbal or written, with reference to the subject matter of this proposal, are hereby abrogated, and this proposal, duly accepted and approved, constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modifications shall be in writing, duly accepted by the purchaser and approved by an executive officer of the company."

We shall not repeat, nor add much by way of elaboration, to what has been so well said by Keith, P., upon this phase of the litigation.

The term "consequential damages" is thus defined in Black's Law Dictionary: "Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." Black's Law Dict. (2d ed.), p. 249. Substantially similar definitions appear in all the authorities on the subject.

It is plain that the items of set-off filed with defendant's plea belong to the class of consequential damages as above defined; and, in view of the foregoing stipulatons of the printed contract, we are of opinion that the trial court

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rightly rejected the parol evidence offered in support of the plea.

The fundamental error in the defendant's contention, as it seems to us, flows from the assumption that if at the date of the contract the parties contemplated that consequential damage might result from delay in delivery of the articles sold, such knowledge had the effect of converting what otherwise would have been consequential damage into direct damage. To the contrary, consequential damage must in fact and effect remain the same, whether in the contemplation of either or both parties or not. It is, however, only when such damages are contemplated by both parties that they are recoverable. This mutual contemplation makes them recoverable, but does not change their character from consequential to direct damages. If the consequences are known, or such as ought to be known, to the seller when the contract is made, he will be liable unless he provides against them in the contract. If they are not such as he knows, or ought to know, will follow a breach, he will not be liable. It would, therefore, be vain and useless to contract against liability "in any event for consequential damages," unless the term is to be construed to refer to consequences in contemplation when the contract is made. Hence, it must follow from the foregoing postulate that the mere fact that consequential damage might result from delay in deliveries of the articles sold was contemplated by the parties at the date of the contract could not *ipso facto* convert such damage into direct damage; and any argument based upon that false premise cannot be sound.

Certain expressions in some of the authorities would seem, at first blush, to support the contention that consequential damages under one state of facts may be direct damages under another. Upon analysis, however, it will be found that the authorities, notwithstanding some occasional confusion in terms, are practically unanimous in

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holding that consequential damages are of the same general character always, and that they may or may not be the subject of liability according to the facts of the individual case. The cases so insistently relied on to sustain the opposing theory are only persuasive because of certain expressions in the opinions, for the question here involved was not in issue in any of them. All that these cases decide is that certain resulting damages, which it was claimed were so remote as to bar recovery, could be recovered. It is conceded in this case that the damages claimed were not so remote as to be barred, but that while not too remote they were damages which resulted, not immediately from the alleged breach, but indirectly from the operation of an intermediate cause or causes. Such damages, nevertheless, are consequential and cannot be recovered in this case because of the express provision of the contract. Any other construction ignores that provision, for unless applicable to such damages as are here contended for, it is difficult to conceive of any damages to which the language could be applied.

Upon these considerations, we feel constrained to hold to our former conclusion on that question.

III. The third question involves the correctness of the instruction of the court upon the allowance of interest.

The record shows that a majority of the jury were not in favor of allowing any interest, and upon their request for information as to their duty in the premises, the court gave the following mandatory instruction:

"The court tells the jury that if they find for the plaintiff they should allow interest from the time the plaintiff's demand accrued under the terms of the contract—that is, from the time the payments became due and payable as set out in the contract—and this interest follows in this case and should be allowed because the defendant has introduced no evidence of damage which could be set off or allowed as against said interest."

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Thereupon the jury gave interest upon $81,652.19, the principal sum allowed by their verdict, at five per cent. from May 1, 1913, subject to a credit of $791.13 as of that date, to March 16, 1915, the time at which the verdict was rendered.

Section 3390 of the Code of Virginia is as follows: "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action, whether on contract or tort, the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which interest shall commence. If a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly."

Without meaning to hold that where there has been a clear and unambiguous agreement for the payment of interest from a fixed and definite date, the jury may remit the interest between that date and the date of their verdict, we are of opinion that under the particular facts of this case the peremptory instruction of the court to the jury on the subject of interest was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error. The case was really before the jury in two aspects—one upon the special contract in its original form, and the other upon the contract as it was claimed to have been modified by certain correspondence. Moreover, there was some room to contend, and some apparent contention, at least upon the part of the defendant in error, that this contract as finally signed by its executive officers, was never accepted by the plaintiff in error. The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon

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the general assumpsit. We think, under all the circumstances of the case, that the statute above quoted applied, and that the jury had the right, in their discretion, to fix the date from which the interest should begin to run.

For the error of the trial court in giving the instruction complained of, the judgment must be reversed, the verdict set aside and the case remanded for a new trial to be had therein in conformity with the views expressed in this opinion.

If, however, the defendant shall, within ninety days from the date hereof, elect in writing to relinquish the interest upon $81,652.19, the principal sum found by the jury, at five per cent. from May 1, 1913, subject to a credit of $791.13 as of that date, to March 16, 1915, the date of the verdict (such relinquishment to be filed with the papers in the cause in the clerk's office of the Circuit Court of Loudoun county as part of the record), then said judgment shall stand affirmed. But in the event of a new trial, this provision is not to influence the jury in determining the question of interest.

There is authority and precedent for this disposition of this branch of the case. See *Buena Vista Co.* v. *McCandlish*, 92 Va. 306, 23 S. E. 781; *Moreland* v. *Moreland*, 108 Va. 107, 60 S. E. 730.

It may be added that so far as the question of consequential damages is concerned, it is immaterial whether the jury based their verdict upon the original contract or not, since under that contract such damages were stipulated against, and without it, on the other hand, the delivery dates upon which the plaintiff in error relies as the basis for its claim to such damages are eliminated.

SIMS, J., dissenting:

The following statement will disclose the reasons which force me to dissent from the majority opinion in this case:

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What are Consequential Damages?

They are indirect damages, as distinguished from direct damages. 1 Sutherland on Dam. (3rd ed.), secs. 14, 15; 1 Sedgwick on Dam. (9th ed.), sec. 111; Anderson's Dict. Law, p. 307; Black's Law Dict. (2nd ed.), p. 314; 5 Am. & Eng. Ency. Law, p. 6; Hale on Dam. (1896), p. 39.

Direct damages are the result of losses which proceed immediately (not necessarily in time, but causatively) from wrongful conduct, without the intervention of any intermediate cause. (We shall presently inquire more concretely, What are direct damages upon the breach of a contract?) Hale on Dam., p. 36; Sedgwick on Dam., sec. 111.

Indirect (consequential) damages are the result of losses which do not proceed immediately (causatively) from wrongful conduct, but from such conduct setting in operation an intermediate cause or causes (which, of course, is, or are, not independent), from which latter the losses directly result. Hale on Dam., p. 39.

Both direct and indirect (consequential) damages are recoverable if they are proximate. Hale on Dam., p. 36; Sedg. Dam., sec. 111; *Louiseau* v. *Arp*, 21 S. D. 566, 114 N. W. 701, 14 L. R. A. (N. S.) 855-8, 130 Am. St. Rep. 741.

Direct damages are always proximate and are recoverable whether they were in fact within the contemplation of the parties or not. (In actions of contract the loss of the thing contracted for is almost necessarily contemplated by the parties, but in some cases the extent of the damage, although direct, is unexpected, and "whether the parties to the contract had in mind the damages which might result from a breach does not in the least affect their liability for a loss resulting from a breach. * * * Compensation is recoverable * * * if the loss is direct,"—and also if indirect [consequential] if proximate, as we shall presently see.) Hale on Dam., pp. 38-9; Sedg. Dam., sec. 111, 121-b.

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Indirect (consequential) damages are sometimes proximate and sometimes remote. The former are always recoverable in actions of tort; and are recoverable in actions of contract unless the contract exempts from liability therefor. The latter are never recoverable, either in actions of tort or contract. Hale on Dam., p. 42; Sedg. Dam., sec. 111.

Indirect (consequential) damages are proximate when they are the natural (normal) and probable result (sometimes spoken of as the *natural,* uncoupled with *probable,* result), of the wrongful conduct. Hale on Dam., pp. 42, 48; Sedg. Dam., sec. 111.

We come now, in the light of the elementary principles and rules above mentioned, to the inquiry as to—

What are direct damages upon the breach of a contract? and, negatively, what are not indirect (consequential) damages in such case?

'The *direct* consequences of a breach of contract is a *loss* of the thing contracted for * * *' (Italics supplied.) Hale on Dam., p. 38.

What is *the thing contracted for* must depend upon the construction of the contract in question. That construction depends in part upon the surrounding circumstances known to both parties at the time the contract was made. *Shenandoah, &c. Co.* v. *Clarke,* 106 Va. 100, 55 S. E. 561; *Merriam* v. *United States,* 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; *U. S.* v. *Bethlehem Steel Co.,* 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731; 1 Sutherland on Dam. (3d ed.), sec. 50, p. 149; *Baldwin* v. *U. S. Tel. Co.,* 45 N. Y. 750, 6 Am. Rep. 165; *Hydraulic, &c. Co.* v. *McHaffie,* L. R. 4 Q. B. 670; *Meyer* v. *Hamer,* 70 App. Div. 529, 535, 75 N. Y. Supp. 261; Sutherland on Dam. (3d ed.), sec. 50, pp. 149-150-1; Hale on Dam., pp. 61-2; *Richardson* v. *Chynoweth,* 26 Wis. 656; 8 R. C. L., p. 27; *Hadley* v. *Baxendale,* cited below; and many other cases on this subject too numerous to cite.

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What is known as *the third rule* in the case of *Hadley* v. *Baxendale* (9 Ex. 341, 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398) decides that if damages result from special circumstances, notice of which is given to a vendor at the time a contract of purchase is made, all damages may be recovered which are the natural and probable consequences of a breach of the contract by the vendor under those circumstances. It does not hold that such damages are indirect (consequential), as counsel for defendant in error, plaintiff in the court below (hereinafter designated plaintiff), contend. Nor does it hold that such damages are direct. In truth, of necessity, in the very nature of the case, and under the elementary rules above mentioned, damages recoverable under the third rule in *Hadley* v. *Baxendale*, may be both direct and indirect (consequential) damages. All damages which are the natural (normal) and probable result of a breach of contract under the special circumstances referred to are recoverable under such rule. That is to say, both direct and indirect (consequential) damages. The limitation in this rule is that they must be the natural and probable consequences of a breach of the contract under those circumstances, *i. e.*, the loss and damages must be proximate, which includes both direct and indirect (consequential) damages. Hale on Dam., pp. 58-9. Hence, this case does not hold that the damages recoverable under its third rule are solely indirect (consequential) damages, but the contrary.

Whether in a particular case, the damages recoverable under the third rule in *Hadley* v. *Baxendale* are direct or indirect (consequential) must be determined by the result of the inquiry of whether they proceed immediately from the *loss of the thing* contracted for, without the intervention of any intermediate cause, such as above referred to, or from such loss setting in operation such an intermediate cause or causes from which latter the losses or damages

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directly result. In principle this is necessarily true. This inquiry unescapably attends every ascertainment of whether damages in any case are direct or indirect (consequential)—when due to special circumstances, as well as in other cases. All causes from which loss and damage may proceed immediately (directly) are causes which also may set in operation other and intermediate causes from which latter also loss and damage may directly result. The loss of a thing contracted for may in every case cause direct and indirect (consequential) damages; in the former case they are direct; in the latter indirect (consequential) damages.

Accordingly we find that the authorities, in dealing with a situation where there is no intermediate cause between the breach of the contract and the damage resulting from the loss of the thing contracted for (that thing being ascertained from a construction of the contract in the light of the surrounding [special] circumstances, hold:

"If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages are within the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are *consequential,* and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated. If all such facts as are admissible to justify the proof of *consequential damages* were re-

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cited in the contract as the law connects them with it when known, or if the legal obligation which the law imposes by reason of them had been expressed in words by the parties, such damages would be *direct* and not *consequential.*" (Italics supplied.) Sutherland on Dam., sec. 50, pp. 149-150.

Discussing the third rule in *Hadley* v. *Baxendale,* viz.: that "When, at the time of making a contract, notice is given the vendor of the purpose of making it, or of special circumstances affecting the quantum of damages likely to result from a breach, damages may be recovered for all the natural and probable consequences of a breach under those circumstances," Hale on Damages, p. 61, says:

"The reason for it is found in the fundamental principle of compensation underlying the entire law of damages. The amount of benefit which a party to a contract would derive from its performance is the measure of damages for its breach." (Citing *Alder* v. *Keighley,* 15 Mees. & W. 117.) "When defendant knows that plaintiff contracts for the purpose of securing a special benefit, he must be deemed to have contracted that plaintiff should receive such benefit, and he is liable for a breach accordingly. The intention of the parties must be arrived at by interpreting the contract in the light of the surrounding circumstances known to both parties, and *such circumstances form as much a part of the contract as if they were written into it.* If the special circumstances were in fact written into the contract, the damages arising from a breach under these circumstances would be *direct* and not *consequential.*" (Italics supplied.)

The same author (Hale on Damages), pp. 61-2, adds:

"If the contract of sale is made to enable the vendee to secure a special benefit and that object is known to defendant, the principle of just compensation requires him to make good the loss arising from his failure to deliver the

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goods." (Citing *Hammer* v. *Schoonfelder,* 47 Wis. 455, 2 N. W. 1129; *Manning* v. *Fitch,* 138 Mass. 275; *Beeman* v. *Benta,* 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779.) "In such case the contract interpreted in the light of the object for which it was made, is more than a mere contract of sale."

Referring to the case of *Hammer* v. *Schoonfelder, supra,* where defendant agreed to furnish plaintiff, a butcher, with ice, knowing that it was needed to preserve meat of plaintiff, and there was a failure to supply the ice, in consequence of which plaintiff lost considerable meat, for which recovery was allowed, 1 Sutherland on Dam., p. 151, says:

"This case was not one of simple contract of sale. The special circumstances, known to both parties, made it more than that in its aims and consequences, although the terms in which it was made, considered alone, imported only a contract of sale. The vendor knowing the purpose for which it was wanted, was held, by implication, to undertake to deliver it as agreed in order that the vendee should not suffer loss on his fresh meat from his inability to preserve it for want of ice. Such being the contract, the loss which occurred from its breach was the *direct* consequence thereof." (Italics supplied.)

"In such case the special circumstances become an implied element of the contract and of the duty thereby imposed." 8 R. C. L., p. 27.

Indeed, such is the effect of the holding in the *Hadley* v. *Baxendale* case itself.

In the case of *Swift Run Co.* v. *Fitchburg Rd. Co.,* 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288, cited in the opinion of this court upon the former hearing of the instant case, the defendant had no notice of the special circumstances.

A number of cases decided by the United States Circuit Courts, falling within the third rule in *Hadley* v. *Baxen-*

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dale, and where there was no intervening cause between the loss of *the thing* contracted for and the damage resulting from such loss, hold that the damages in such cases are direct. *Iowa Mfg. Co.* v. *B. F. Sturtevant,* 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *McDonald* v. *Kansas City, &c. Co.,* 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Northwestern, &c. Mfg. Co.* v. *Great Lakes, &c. Works,* 181 Fed. 38, 104 C. C. A. 52; and other cases cited in such cases.

To the same effect are also the following cases:

See *Richardson* v. *Chynoweth,* 26 Wis. 656.

In *Willey* v. *Fredericks,* 10 Gray (Mass.) 357, the action was for damages for breach of contract to build a proper wall. Owing to such breach of contract the owner lost the use of certain land. Held:

"Damages for the loss of the use of the land during such time are not remote, speculative or contingent, but the *direct* and immediate consequences of the defendants' failure to perform their contract and duty." (Italics supplied.)

Counsel for plaintiff take the position that in "substantive law, the whole realm of damages is divided into two classes, 'direct' and (indirect) 'consequential.'" This position, as we have seen, is correct. Counsel thereupon with great ability, press forward to and attempt to maintain the further position that as in "pleading and practice the whole realm of damages which can be recovered is divided into 'general' and 'special' damages * * * and that 'special damages' are the same as 'consequential damages' which are not so remote that they cannot be recovered." That is to say, that all direct damages are general and all special damages are indirect (consequential) damages. The following authorities are cited and relied on to sustain this position: *Loesch* v. *Koehler,* 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682-4; *Thomas* v. *Dingley,* 70 Me. 100, 35 Am. Rep. 310-311, 314; *Battley* v. *Faulkner,* 3 Barn.

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and Ald. 294, 3 Common Law Rep. 290; *Laing* v. *Calder,* 8 Penn. 479, 49 Am. Dec. 533-4; Sedg. on Dam. (4th ed.), p. 682; Hale on Dam., pp. 36, 39, 223; *Eaton* v. *Boston, &c. R. R.,* 51 N. H. 504, 12 Am. Rep. 147; *Wallace* v. *Ah Sam,* 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534-7; 4 Words and Phrases, p. 3060; *Lee* v. *Hill,* 84 Va. 919, 921, 6 S. E. 473; *Wood* v. *American Nat. Bank,* 100 Va. 306, 309, 40 S. E. 931; *N. & W. R. Co.* v. *Spears,* 110 Va. 110, 113, 65 S. E. 482; Sutherland on Dam. (3d ed.), sec. 14.

An examination of these authorities discloses that they do hold, it is true, that "special damages" must be specially pleaded or alleged to be recovered; but they fall short of holding that all general damages are direct and that all special damages are indirect (consequential) damages. It is manifest from these authorities that indirect (consequential) and special damages are not terms of identical meaning. They do not cover the same ground. It is true that their boundaries interlock. These boundaries cover in part the same territory of the law of damages, but they do not coincide throughout. These authorities do not hold that special damages may not also sometimes be direct damages. We have seen that they may be. Those authorities do not hold that in such case special damages need not be specially pleaded or alleged to be recovered. On the contrary, Sutherland on Dam. (3d ed.), sec. 14, in discussing direct damages, says:

"*What these include.* These include damages for all such injurious consequences as proceed immediately" (not necessarily in time but causatively) "from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegations of damages in the declaration, but also *other direct* effects which in the particular instance naturally resulted and *must be alleged specially* to be recovered for." (Italics supplied.)

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Special damages are distinguished from general damages by a wholly different test from that of whether they are direct or indirect (consequential); namely, by the test of whether the damages are implied by law, in which case they are general damages, or whether they are not implied by law but arise from special circumstances, in which case, whether direct or indirect (circumstantial), they are special damages and must be specially pleaded or alleged to be recovered; and the ultimate reason for the different character of pleading required with respect to general and special damages, respectively, is, to prevent a surprise on the defendant and to enable the latter to properly prepare his defense. The application of this reason affords the fundamental test, and not the inquiry of whether the damages are direct or indirect (consequential).

As said by Hale on Dam., p. 223, cited by counsel for appellee, quoting from Chitty on Pl.: "Special damages are such as really took place and are not implied by law * * *" Again, the same author quotes from same authority in reference to its not being necessary to state descriptions of general damages in the declaration, "because presumptions of law are not in general to be pleaded or averred as facts." and proceeds with the quotation: " 'But where the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. * * * And whenever the damages sustained are not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it.' "

We reach the conclusion, therefore, both on principle and upon authority, that damages arising upon the breach of

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a contract in a case falling under the third rule in *Hadley* v. *Baxendale* may be both direct and indirect (consequential) damages. Those which proceed immediately (causatively) from the loss of the thing contracted for without the intervention of any intermediate cause, are direct damages. Those, if any, which do not proceed immediately (causatively) from the loss of the thing contracted for, but from such loss setting in motion an intermediate cause or causes from which latter the losses directly result, are indirect (consequential) damages; as would be also many other possible occurrences of damages which might have arisen under the contract in the instant case, which so far as we know have not arisen, or, at least, are not involved in the suit before us, but for which paintiff was exempted from any liability by the clause in the contract with respect to "consequential" (indirect) damages.

Now what is an "intermediate" cause, such as referred to in the next preceding paragraph, in a case of a breach of a contract?

Manifestly it is a cause extrinsic to the contract when the latter is construed in the light of all the surrounding circumstances—in the light of the special circumstances of which the vendor has notice at the time of the making of the contract; that is to say, it is a cause of which such special circumstances gave the vendor no notice.

Coming now more specifically to the case at bar, the question is—

Did the damages claimed by plaintiff in error, defendant in the court below (hereinafter referred to as defendant), as to which the evidence tendered was excluded by the trial court, proceed from the operation of a cause or causes of which the vendor (the plaintiff) did not have notice at the time of the making of the contract, or immediately (causatively) from a cause or causes of which the vendor had notice?

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It is, of course, not intended to conclude what the facts really are or might prove to be; but, assuming, as we must, upon the consideration of the admissibility of such evidence, that the statements accompanying the tender of such evidence would have been sustained by the proof, it appears that the items of damages claimed by defendant proceeded directly from a cause or causes of which the plaintiff had notice at the time of the making of the contract. Counsel for plaintiff, in the brief filed February 26, 1915, state: "Each and every one of these items grew out of the fact that the plaintiff in error had leased from the Southern Railway Company the Bluemont division of its road and had covenanted to take over and operate the same on the 1st of July, 1912." The plaintiff in the court below had notice of this lease at the time of the making of the contract in question and of the pertinent provisions of such lease. Such counsel then takes the position that: "When the contract was entered into, it is clear that the possibility of such damages arising was in the minds of the parties, but that the defendant in error was unwilling to enter into the contract which it did and incur a liability for damages growing out of these peculiar circumstances * * * determined to protect itself against such damages by contract * * *" and hence, "It provided in the contract that it should not be held responsible or liable in any event for consequential damages." Counsel for plaintiff add: "But for this provision in the contract it seems unquestioned that the defendant in error would be liable for the off-sets in the bill of particulars, and because of this contract provision it is clear that it is not liable for these consequential damages."

Counsel for plaintiff, it is very true, contend that such damages were not direct, but indirect (consequential) damages; but it is not claimed that they were so because they proceeded from the operation of a cause or causes of which the plaintiff did not have notice at the time of the making

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of the contract. This is in effect admitted. (Of course, upon the assumption that the statements accompanying the tender of the evidence in question would have been sustained by the proof.) The position that such damages are consequential and not direct, is based upon the contention that *all damages arising from special circumstances* are indirect (consequential) although the vendor has notice of such circumstances as aforesaid. This position has been considered above and found untenable, on principle and upon authority, as there set forth.

The conclusion, therefore, seems inevitable from the case as made by the statement accompanying said evidence, that the damages in question did not proceed from the operation of a cause of which the vendor (the plaintiff) did not have notice as aforesaid; but immediately from the said cause of which the debtor had notice.

Hence the further conclusions are inevitable (predicating that the statements accompanying the evidence aforesaid would be sustained by the proof) that the damages in question are direct damages not indirect (consequential) damages; and that the provision in the contract exempting the plaintiff "in any event, from consequential damages" does not protect it from liability for the damages claimed by defendant in this case.

The provision referred to in the contract would operate upon and exempt the plaintiff from liability for all damages arising from intermediate causes set in operation by the said cause of which the plaintiff had notice, from which intermediate causes losses directly result, and from other indirect (consequential) damages such as might result from many other possible occurrences, as indicated above. But the case before us does not present one in which any such indirect (consequential) damages are sought to be recovered.

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That is to say, the application of the foregoing authorities to the instant case produces the following resultant conclusion:

The contract in the instant case impliedly contained—and it must be read and construed as if it in fact expressly contained, written into it—the special circumstances referred to in the statement accompanying the tender of the excluded testimony. Hence, all damages which arose from a breach of such contract, which were the result of losses which proceeded immediately (causatively) from such circumstances without any intermediate cause, were the direct result of a breach of this very contract and direct and not consequential (indirect) damages.

The term "consequential" (indirect), used in the exemption clause of the contract referred to, is not broad enough in its meaning to cover direct, as well as indirect, damages arising from delay in delivery of the goods sold—which, indeed, counsel for plaintiff admit; but the exemption which plaintiff now claims it sought for itself by the use of this term in the contract amounts to this in effect. Even plaintiff, it is to be noted, cannot bring itself to make the claim of this exemption except indirectly, by the use of the contention that it is not seeking exemption under such term from *direct damages* for such breach of its contract. It can but admit that such term was not used with the intention of exempting it from such direct damages. Hence, plaintiff admits, in effect, that it did not even propose to use in the contract the term in question with such meaning, although the effect of giving the construction to the contract for which it now contends would be to give such term that meaning. And, on the side of the defendant, it is manifest, in view of the statement accompanying the tender of the excluded evidence, that if such meaning had been expressed in the drafts of the contract so as to have been so understood by defendant, it would not have been signed by it.

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In this situation the court would be making for the parties a contract different from that in fact made by them if it gave to the term "consequential" the effect now sought to be given it by the plaintiff. Aside from all consideration of the accurate technical meaning of the phrase "consequential damages" is this fundamental and unsurmountable difficulty, which lies in the way of the construction of the contract for which counsel for appellee contend, and which is given it in the majority opinion of the court.

The Measure of the Damages.

Many authorities have been cited and relied on by counsel for defendant and plaintiff with respect to the proper measure of damages in the case at bar; whether the evidence rejected by the trial court was admissible as bearing upon the proper measure of damages in such case.

As we have seen, where the damages are direct, they may always be recovered. In such case they are certain in respect to the cause from which they proceed. But there is another rule as to certitude not laid down in the noted case of *Hadley* v. *Baxendale,* which is essential to the recovery, even of direct damages, as well as of proximate indirect damages, namely, they must be proved with reasonable certainty. *Burruss* v. *Hines,* 94 Va. 413, 26 S. E. 875; *Bristol Ry. Co.* v. *Bullock, &c. Co.,* 101 Va. 652, 44 S. E. 892. And "the law adopts that mode of estimating the damages which is most definite and certain" in the particular case. *Griffin* v. *Colver,* 16 N. Y. 489, 69 Am. Dec. 718. The party injured "must do the best he can," "what he reasonably can," to avoid the injurious consequences under the circumstances in which he is placed. Hale on Dam., pp. 64-6-8-9. In case of delayed delivery, if there is a market in which the vendee can supply the loss of the thing contracted for, he should avail himself of it, and whether he does so or not, the dif-

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ference between the market value and that contracted for, is the measure of damages; but when there is no market value, this rule has no application. *Trigg, &c.* v. *Clay,* 86 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723; Sedg. Dam., p. 281; Sutherland Dam., sec. 46. Where there is no such market value and the vendor at time of contract has actual or implied notice of this fact, the vendee may recover lost profits if proved with reasonable certainty. *Richardson* v. *Chynoweth,* 26 Wis. 656; *Weston* v. *Boston Railroad,* 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Greberi-Borguis* v. *Nugent,* L. R. 15 Q. B. 85, 89; *Griffin* v. *Colver,* 16 N. Y. 489, 69 Am. Dec. 718; *Gagnan* v. *Sperry, &c.,* 206 Mass. 547, 92 N. E. 761; *Consumers Ice Co.* v. *Jennings,* 100 Va. 719, 42 S. E. 879; *Perry Tie Co.* v. *Reynolds,* 100 Va. 264, 269-70, 40 S. E. 919; *Burruss* v. *Hincs, supra.* Lost profits or lost gains are as recoverable as any other loss, if proved with reasonable certainty. "While a plaintiff is deprived of use of property valuable for use, and the property is something that can be replaced, his damages are the expenses of hiring property which he is forced to substitute for it." *Weston* v. *Railroad Co., supra.* It is true that the holding just quoted was not necessary for the decision of that case, but it is manifestly sound in principle as applicable to a situation where a hiring is the best course which the vendee can "reasonably" pursue, to minimize the loss under the circumstances in which he is placed. There are cases where the "real value" or "true value" is the measure of damages, there being no market value, as in *Loesch* v. *Koehler,* 144 Ind. 278, 41 N. E. 326, 43 S. E. 129, 35 L. R. A. 682-4, where there was no market value for the plaintiff's horses which were killed, but they had a real or true value for the particular use to which he could have put them. Such a measure of damages is properly resorted to where it is the "most definite and certain" which is applicable to the case

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in hand. It could have no proper application in the case at bar.

The evidence rejected by the court below should have been admitted as tending to prove the damages claimed by appellant.

It is not intended to be said that such evidence was sufficient to prove such damages "with reasonable certainty." There are manifestly some elements entering into the question which are absent from the items of the bill of particulars on their face; such as the expense which defendant would have had to bear had it been able to use the motive power intended and it had not been forced to use steam motive power instead. (See *Bristol Ry. Co.* v. *Bullock, &c. Co., supra.*) But this and the like matters of fact, affecting the certainty and definiteness of the proof of the damages so as to entitle the defendant to have them allowed as a set-off, are matters which would be developed in a trial of the case on its merits.

I think, therefore, that the evidence excluded by the court below should have been admitted, and for the reasons given above I cannot concur in that part of the opinion of the majority of the court which holds to the contrary.

I concur in the conclusion of that part of the majority opinion which reverses the case on the ruling of the court below on the subject of interest, as the instant case is one "founded on" the contract and is not an action on the contract itself; but not in its affirmance of the judgment of the court below should the plaintiff submit to the terms stipulated in such opinion with respect to relinquishment of interest.

This being a dissenting opinion, it would serve no good purpose to deal therein with question "I" not passed upon in the majority opinion.

Reversed in part.

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Syllabus.

Richmond.

VIRGINIA RAILWAY AND POWER COMPANY v. GORSUCH.

March 15, 1917.

1. TRIAL—*Reopening Case.*—In an action for personal injuries occasioned by a collision between a street car and an automobile, defendant street railway company, after the evidence had been concluded and plaintiff had rested and concluded her case, demurred to the evidence, because no proof had been offered as to the ownership of the street car which collided with the automobile. The trial court allowed plaintiff to reopen the evidence and prove the ownership of the street car. In this there was no error. At that stage of the proceedings they were within the control of the trial court, and it was the duty of the judge to permit the plaintiff to prove a fact which had been inadvertently omitted, but about which there was no doubt whatever. Had the court refused to do so, it would have been reversible error. Matters of this sort are within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner.
2. IMPUTABLE NEGLIGENCE—*Passenger in Private Vehicle.*—Where a passenger is in a private vehicle by invitation and is exercising no control over the driver, the negligence of such driver cannot be imputed to the passenger. If precluded from recovery it must be because of his own negligence.
3. AUTOMOBILES—*Imputable Negligence.*—The negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver.
4. AUTOMOBILES—*Imputable Negligence—Husband and Wife.*—The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation.
5. IMPUTABLE NEGLIGENCE—*Bailor and Bailee.*—The negligence of a bailee of property, over whom the bailor is exercising no control at the time of the injury, is not imputable to the bailor.

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6. IMPUTABLE NEGLIGENCE—*Master and Servant.*—The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions.
7. IMPUTABLE NEGLIGENCE—*Husband and Wife—Contributory Negligence.*—The wife owned an automobile. Her husband at work in another city from his home borrowed it from her. The husband had had possession of the automobile for about a week when his wife visited him, and while riding in the automobile driven by her husband was injured in a collision with a street car. The wife was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time with a guest.

   Held: That the negligence, if any, of her husband, could not be imputed to her, and that she was herself guilty of no negligence.
8. HUSBAND AND WIFE—*Obligation of Wife.*—Notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband.

Error to a judgment of the Circuit Court of the city of Richmond, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

H. W. Anderson, A. B. Guigon and *Thos. P. Bryan,* for the plaintiff in error.

J. Kent Rawley and *M. J. Fulton,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

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A collision occurred at the intersection of Eighth and Grace streets, in the city of Richmond, on the night of September 19, 1914, between 11:30 and 12 o'clock, between a west-bound automobile and a north-bound street car of the Virginia Railway and Power Company. The occupants of the automobile were Mr. Thomas H. Gorsuch, his wife Sophia, and their friend, Mr. John F. Stephenson. The front part of the automobile was seriously damaged and Mrs. Gorsuch was injured.

Mr. Gorsuch was employed by the Virginia Railway and Power Company to do some work in the city of Richmond in connection with dismantling certain plants on Brown's Island and re-erecting them on Belle Isle. His wife lived in the city of Baltimore. She owned the automobile referred to, but Mr. Gorsuch, shortly before the accident, had told her that he had so far to walk to his work, it would be a convenience to him to have the use of the automobile in Richmond, and she had sent it to him, and it had been in Richmond and in his possession for about a week before the date of the accident. On the afternoon of the day of the accident, Mrs. Gorsuch came from Baltimore to Richmond for a visit, was met at the train by her husband with the automobile, and after a pleasure ride Mr. Stephenson was invited to go with them to a local hotel, where the party had something to eat with some beer (though there is no suggestion of intoxication), and after watching the dancing they started home about 11:30 p. m. Within one square after the automobile started, the collision occurred. At that time the surface of Grace street was torn up because the company was relaying or repairing its tracks at that point. The excavations made it necessary to provide a temporary crossing over the tracks at the place of the accident, which consisted of railroad ties laid alongside of each other, making a crossing twelve feet wide.

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1. One of the errors assigned is, that after the evidence had been concluded, the defendant company had demurred to the evidence because it had not been proved that the street car was the property of the Virginia Railway and Power Company, although the plaintiff, Mrs. Gorsuch, had rested and concluded her case, after the statement of the grounds of demurrer, the court allowed her to reopen the evidence and prove the ownership of the street car.

There is no merit in this assignment. At that stage of the proceedings they were within the control of the trial court, and it was the duty of the judge to permit the plaintiff to prove a fact which had been inadvertently omitted, but about which there was no doubt whatever. Had the court refused to do so, it would have been reversible error. Matters of this sort are within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. *N. & W. Ry. Co.* v. *Coffey*, 104 Va. 670, 51 S. E. 729, 52 S. E. 367; *Daniels* v. *Thacker Fuel Co.* (W. Va.), 90 S. E. 841; *Burns Bros.* v. *Morrison*, 36 W. V. 423, 15 S. E. 62; *Cook* v. *Raleigh Lumber Co.*, 74 W. V. 503, 82 S. E. 327.

2. Another error assigned is the failure of the court below to instruct the jury that the contributory negligence of the husband, Mr. Gorsuch, should be imputed to Mrs. Gorsuch in bar of her recovery.

The doctrine of imputable negligence has been discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority, that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. It seems to be well settled that the negligence of a husband

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driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. *Anthony* v. *Kiefner*, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915-F, 876, Ann. Cas. 1916-E, 268; Ann. Cas., 1912-A, 649; *Reading Township* v. *Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; 110 Am. St. Rep. 289; *Schultz* v. *Old Colony R. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Wachsmith* v. *B. & O. R. Co.*, 233 Pa. St. 465, 82 Atl. 755, Ann. Cas. 1913-B, 679; *St. Louis & S. F. R. Co.* v. *Bell* (Okl.), 159 Pac. 336.

It is earnestly claimed, however, that because of the fact that Mrs. Gorsuch owned the automobile involved in this collision, none of the rules above stated are applicable to this case, and that Mrs. Gorsuch, as the owner of the machine, had such control, or right of control, over it as to make her responsible for the negligence of her husband.

We cannot agree with this suggestion. Mr. Gorsuch was the gratuitous bailee of her automobile and had been for a week before the accident. His control of it while his wife remained in Baltimore, was as absolute as if he had owned the machine, and the casual visit of Mrs. Gorsuch to Richmond did not change this control.

The case of *Hartfield* v. *Roper & Newell*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, decided in 1839, is instructive. Newell had demised his team for a term of two years, which had not expired at the time of the injury, to his son-in-law and co-defendant, Roper. The accident, however, occurred when Newell, the owner of the team, was riding in the vehicle, and the court acquitted him of responsibility for the accident upon the ground that at the time thereof he had no control over the team and could not be made liable

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without proof of positive and active concurrence in the injury, quaintly adding, "a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one."

This appears from the case of *New Jersey Electric Ry. Co.* v. *N. Y., L. E. & W. R. Co.*, 61 N. J. L. 287, 41 Atl. 1116, 43 L. R. A. 849. The New York, Lake Erie and Western Railroad Company was the owner of a certain locomotive and cars which had been injured in a collision between such locomotive and an electric car of the New Jersey Electric Railway Company. At the time of the accident the locomotive and cars of the plaintiff had been hired by the day and from day to day for the use of another company, the New York and Greenwood Lake Ry. Co., which latter company was, with its own engineer, fireman and employees, operating the same upon its own roadbed and rails at the time and place of the collision. The effort was made to impute the negligence of the operating company, the lessee, to the New York, Lake Erie and Western Railroad Company, the owner of the cars, but the court refused to take that view, saying, among other things: "In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other."

The modern and better doctrine is that the negligence of a bailee of property, over whom the bailor is exercising no

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control at the time of the injury, is not imputable to the bailor. Hence, a livery stable keeper is not prevented from holding a railroad company liable for negligently killing a horse because the negligence of the hirer, in whose sole control the animal was, contributed to the injury. *Gibson* v. *Bessemer & Lake Erie R. Co.*, 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 690, 18 Ann. Cas. 535.

The proposition is also strengthened by *Sea Insurance Co.* v. *Vicksburg, S. & P. R. Co.*, 159 Fed. 676, 86 C. C. A. 544, 17 L. R. A. (N. S.) 925; *Currie* v. *Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356; *Ala. G. S. R. Co.* v. *Clark*, 145 Ala. 459; 39 So. 816; Van Zile on Bailments and Carriers (2nd ed., 1908), sec. 119; 3 R. C. L. 147.

We know of no reason for applying a different rule when the bailment is gratuitous.

The relation of Mrs. Gorsuch to Mr. Gorsuch, under the circumstances above referred to, was that of bailor to bailee, and until she resumed control of the property, the operation of the car was as completely within his control as if he had been the fee simple owner thereof.

Mrs. Gorsuch, at the time of the accident, was no more responsible for the negligence of her husband than the other guest who was riding in the machine was responsible therefor. In order to defeat her recovery in this case, it would be necessary to prove that she was herself guilty of some negligence. This the record fails to show. She was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and notwithstanding the advances made by modern women towards political and

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economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband, as is suggested in *Reading Township* v. *Telfer, supra;* Ann. Cas., Vol. 22, 1912-A, 649.

There is nothing then in this record to indicate any negligence on the part of the plaintiff in the action, Mrs. Gorsuch.

Where a passenger is in a private vehicle by invitation and is exercising no control over the driver, the negligence of such driver cannot be imputed to the passenger. If precluded from recovery it must be because of his own negligence. This case is controlled by the well-established doctrine announced in the case of *Atlantic & Danville R. Co.* v. *Ironmonger,* 95 Va. 632, 29 S. E. 319.

It follows from this that it is unnecessary to pass upon the question as to whether the evidence indicates that the negligence of her husband contributed to the accident. Whether it did or not, under the circumstances of this case, it cannot be imputed to her.

Mrs. Gorsuch made no claim in her testimony for damages for injury to the automobile, and her husband stated that the automobile had been repaired at his own expense. The court apparently eliminated this element of damage from the consideration of the jury, for the instruction as to damages limits the jury to the consideration of her physical and bodily injuries, mental suffering caused by the accident, and actual damages to wearing apparel and jewelry; and the jury unquestionably heeded this instruction, because they rendered a verdict for $600, and the repairs to the automobile alone, according to the testimony, amounted to $590.

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The question as to responsibility for the accident was fairly submitted to the jury, and they were justified, upon the evidence introduced by the plaintiff, in inferring the negligence of the company from the failure of the motorman to keep a proper lookout for travelers upon Grace street, and in failing to moderate the speed of the street car in accordance with the city ordinance limiting that speed to four miles an hour when crossing Grace street.

The judgment will, therefore, be affirmed.

Affirmed.

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Richmond.

VIRGINIA RAILWAY AND POWER COMPANY v. HUBBARD.

March 15, 1917.

1. DAMAGES—*Aggravation of Previous Disease—Necessity of Alleging Disease.*—Where a wrong is committed, whatever the physical condition of the injured party, whether he be strong or weak, healthy or sickly, the harm done by such wrong, including the aggravation of existing ailments, if any, is the natural consequence of the defendant's act, and need not be specially averred.

2. DECLARATION—*Allegation of Pre-existing Disease.*—In an action by a female passenger against a street railway for injuries received when an alleged drunken passenger, upon the car suddenly starting, fell upon her, striking her with his hand or fist in the abdomen, the declaration alleged that such drunken passenger fell with great force and violence against the plaintiff, injuring her back and inflicting serious internal injuries upon her, and otherwise greatly bruising, wounding, and hurting her, and that the plaintiff became and was sick, sore and lame, and so continued for a long space of time, during which time plaintiff was prevented from attending to her lawful and necessary affairs, and was obliged to expend a large sum of money in endeavoring to be cured, and in payment for a serious surgical operation necessitated by her injuries, and during all of said time suffered and underwent great pain and anguish, both physical and mental, and had been permanently injured and impaired.

   Held: That the allegations of this declaration were sufficient to admit proof of the existence of a pre-existing tumor, from which she had suffered little inconvenience; that as a result of the blow an operation was made necessary; the physical pain preceding and succeeding the operation, and of the condition of the plaintiff at the time of the trial.

3. DAMAGES—*Personal Injuries—Pre-existing Disease.*—In such an action the defendant's rights are fully safeguarded by an instruction that the jury, if they believe from the evidence that the plaintiff had a fibroid tumor before she received the injury complained of, then the plaintiff can recover nothing on ac-

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count of any condition existing before said injury, or for anything that would have resulted from said condition independently of the accident.

4. CARRIERS—*Degree of Care—Injury to Fellow Passenger by a Drunken Passenger.*—A carrier of passengers owes to all passengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers. Where a passenger in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury complained of to the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident.

5. CARRIERS—*Passengers—Drunken Passengers.*—A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen.

Error to a judgment of the Circuit Court of Norfolk county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Williams, Tunstall & Thom and *H. W. Anderson,* for the plaintiff in error.

Rumble & Campe, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The evidence in this case is sufficient to show that Mrs. Hubbard, while riding as a passenger on a car of the defendant company, was injured because a fellow passenger, Zimmer, who was standing in the aisle of the car stooping

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over talking to another passenger, when the car suddenly started, fell upon her, his hand or fist striking her in the abdomen, from which blow she immediately suffered very great pain and inconvenience. Mrs. Hubbard for some years previous to that time had had a fibroid tumor in her womb, which she had been advised to have removed, but which had not been done because, as she states, it had not caused her any trouble or inconvenience, had required no treatment, and had not interfered in any way with her efficiency or comfort. As the result of the blow an operation was made necessary. The accident occurred on Saturday, January 2, 1915. Immediately after the injury she was seized with violent pains and became unable to retain her urine. This condition continued until Wednesday, January 6th, when, upon the advice of her physician, she went to a hospital to undergo an operation. She was found to be too sore and sensitive for an immediate operation, and for this reason it was deferred until January 14th. Mrs. Hubbard was at this time thirty-six years of age, and it was necessary to remove the womb, both ovaries and the Fallopian tubes.

The negilgence relied on is that Zimmer was so much under the influence of liquor as to make it probable that if allowed to stand in the aisle just such an accident to some passenger as happened to Mrs. Hubbard was to be anticipated. There is irreconcilable conflict in the testimony as to the extent of Zimmer's intoxication, and the company urges, among other grounds of defense, that there was nothing whatever in his condition to indicate to the conductor of the car that he was at all dangerous to any one, and hence that there was no negligence upon which to base a recovery.

That it was error to permit evidence as to the aggravation of the injury growing out of the pre-existing tumor is alleged. Thus, counsel states that his assignments of error Nos. 1 and 3 involve "the question whether there can be a

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recovery for the aggravation of a pre-existing disease when the declaration is framed on the theory that the disease was produced by the injury."

While this question was apparently left undecided in *Norfolk, &c. Co.* v. *Williar,* 104 Va. 679, 52 S. E. 380, it was determined in accordance with the view herein expressed in *Norfolk, &c. Co.* v. *Spears,* 110 Va. 113, 65 S. E. 482.

In the reply brief of the plaintiff in error this is stated: "The whole point we make is that the declaration was silent as to the tumor in the plaintiff's womb. But the declaration does say in express terms that the injury the plaintiff received was due to the accident, while the proof shows that it was far more due to the presence, undisclosed by the declaration, of the tumor."

Our especial attention is called to *Whitlock* v. *Mungivan,* 36 R. I. 386, 90 Atl. 756, as support for the contention. In that case, however, the declaration merely alleged that the defendant, "with force and arms, a violent assault in and upon the body of the plaintiff did then and there make, and him the plaintiff, did then and there with like force and arms, beat, bruise, wound and evil entreat, and other wrongs to the plaintiff then and there did," to the damage of the plaintiff, etc.; and there the court reversed the judgment because evidence had been admitted of the aggravation of a rupture and of the amount of medical expenses incurred, and also of the continuance of plaintiff's pain and suffering after the date of the issuance of the writ, and of his physical condition at the time of the trial, for the reason, as stated in the opinion, that, if it was desired to recover such damages it was necessary to allege them. There is little support here for appellant's contention in the case now under consideration. In the declaration which we are now considering, the plaintiff alleges that Zimmer "fell with great force and violence upon and against the said plaintiff, injuring the plaintiff's back and inflicting serious internal

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injuries upon the said plaintiff, and said plaintiff was otherwise greatly bruised, wounded, hurt and injured, and also by means of the premises said plaintiff became and was sick, sore, lame and disordered, and so continued for a long space of time, to-wit, hitherto, during all which time said plaintiff was prevented from attending to her lawful and necessary affairs, and thereby also said plaintiff was obliged to expend and did pay out and expend divers sums of money, amounting in the whole to a large sum of money, to-wit, the sum of five hundred dollars, in and about endeavoring to be cured of the said bruises, hurts and injuries so received as aforesaid, and in and about a serious surgical operation necessitated thereby, and during all of said time suffered and underwent great pain and anguish, both physical and mental, and had been, by means of the premises, permanently injured and impaired."

The only reason for the rule relied on is that the declaration should fairly give notice of the claim of the plaintiff, and under our statute, if the allegation is considered by the defendant to be too general and vague, he has the right to call for a bill of particulars and to require further specifications of such claim. Here, then, the allegations of the declaration sufficiently advised the defendant of the purpose of the plaintiff to prove that a surgical operation was necessitated, that medical expenses had been incurred, that she had suffered great pain, physical and mental, and that her injuries were permanent; so that even if the rule be as strict as is claimed, it is sufficiently met by this declaration, and we find no evidence in the record which is inadmissible under these allegations. We do not understand that it is denied that the aggravation of an existing disease may be proved, if sufficiently alleged; certainly the authorities are abundant to establish this proposition.

It is succinctly stated in 8 R. C. L. 436 thus: "It is a general rule that one who negilgently inflicts a personal in-

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jury on another is responsible for all the ill effects which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. Hence a defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health. In other words, where the presence of disease, or the existing physical condition, aggravates and prolongs the injury and correspondingly increases the damages, such increase or added damages may be recovered."

This general statement of the law is amply supported by the authorities cited in the notes.

There have been many cases as to the necessity of alleging the aggravation of an existing ailment, if recovery is sought therefor, and there has been some conflict of opinion, but we believe the true doctrine is stated in 8 R. C. L. 622 in this language: "It has been held that damages cannot be recovered for a mere aggravation of injuries previously received where such aggravation is not alleged in the complaint; but the more liberal rule is that where a wrong is committed, whatever the physical condition of the injured party, whether he be strong or weak, healthy or sickly, the harm done by such wrong, including the aggravation of existing ailments, if any, is the natural consequence of the defendant's act and need not be specially averred."

In *Peshine* v. *Shepperson*, 17 Gratt. (58 Va.) 472, 94 Am. Dec. 468, this court, in an action for trespass, and under an allegation that the defendant entered the store of the plaintiff "and then and there and from the said store took and carried away a large quantity of the goods and chattels of the plaintiff, to-wit, etc., all of great value, viz: of the value of $5,000, and other wrongs to the plaintiff, then and there did," adopted the most liberal rule, upon the

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ground that the plaintiff was entitled to recover for all such damages as were the natural, proximate and necessary consequences of the act, allowed proof of injury to the credit and business standing of the merchant and injury to his business resulting therefrom, as to whether the business had been profitable or unprofitable, and as to the extent and character of the business; as affording the best guide to the jury of which the nature of that case admitted.

We find no error in the refusal to grant the instructions offered by the plaintiff in error embodying the contrary doctrine; and its rights in this case were fully safeguarded by instruction No. 5, which was granted, and reads thus:

"The court instructs the jury that if they believe from the evidence that the plaintiff had a fibroid tumor before she received the injury complained of, then the plaintiff can recover nothing on account of any conditions existing before said injury, or for anything that would have resulted from said conditions independently of the accident."

The allegations of the declaration were sufficient to admit proof of the existence of the tumor and of the immediate effect of the blow, of the physical pain preceding and succeeding the operation, of the operation itself, and of the condition of the plaintiff at the time of the trial.

We are asked to reverse the judgment upon the ground that the verdict is contrary to the law and the evidence.

It is admitted (and the authorities are abundant to sustain the proposition) that if Zimmer was in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury to enable the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident.

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A carrier of passengers owes to all passengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers. 8 Ann. Cas. 222; Ann. Cas. 1912-C, 278; 4 R. C. L. 11, 81, *Jansen* v. *Minneapolis, &c. R. Co.*, 112 Minn. 496, 128 N. W. 826, 32 L. R. A. (N. S.) 1206; *Va. Ry. & Power Co.* v. *McDemmick*, 117 Va. 862, 86 S. E. 744; *Montgomery Traction Co.* v. *Whatley*, 152 Ala. 101, 44 So. 538, 126 Am. St. Rep. 17; *Murgatroid* v. *Blackburn, &c. Co.*, 3 Law Times Rep. 180.

We are urged to give careful attention to the evidence, upon the theory that even considered as upon a demurrer to the evidence, the verdict and judgment are erroneous. Having done so, we are unable to differentiate this case from many others which have been previously decided by this court, where the evidence is conflicting.

The verdict is sustained by the evidence of the defendant in error, Mrs. Hubbard, who states that Zimmer entered the front door of the car in a drunken condition; that he came in in an unsteady and rather loud and boisterous manner; that he stood with his back to the front door of the car and talked in a loud voice, and was unsteady all of the time; that he moved about in the aisle of the car in a noisy and unsteady manner, trying to shake hands with other passengers; that the smell of whiskey was strong upon his breath; and that one of the passengers told him to sit down or he would get into trouble. Another witness, Eanes, testified that he saw Zimmer enter the front door; that "he appeared to be a drunken man, to me—a man full of whiskey;" that he leaned against the front door of the car; that he didn't remember his words, that "He was just running on a whole lot of gab," and doing "a whole lot of talking;" and that he was staggering and carrying on a whole lot of foolishness that a sober man would not do; that he was not using any profane or indecent language. Another witness, King, says that he had his attention attracted to

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Zimmer by his talking and standing and swinging from side to side; that he was intoxicated and unsteady on his legs, and looked as if he might fall over on somebody; that he was liable to fall and hurt himself, or hurt somebody else; that this lady (referring to Mrs. Hubbard) appeared to be annoyed; and that a lady sitting in the corner next to Zimmer appeared to be afraid he would fall on her. This latter statement is confirmed by a witness for the company, Branton.

After allowing for all of the exaggeration which in view of the contradictory testimony introduced by the defendant may be apparent, it appears that the fact that Zimmer's condition was dangerous to his fellow passengers is confirmed by some of the witnesses introduced by the defendant. For instance, Branton, when asked what was Zimmer's condition, answered: "He got into the car; when he first came into the car he stopped at the door and leaned up against the door, and stayed there talking and carrying on." This witness also admits that Zimmer was not sober, and that Mrs. Branton, who was seated beside witness, was afraid he might fall on her. Brinkley, another witness for the defendant, stated that Zimmer "looked to be a little drinky," and on cross-examination said that he told Zimmer to go and sit down, but he replied that he had paid his fare and had a right to stand up. Another witness for the defendant, Blow, said that Zimmer always appeared to be about half full of liquor, and on this occasion he appeared to be about half drunk.

Zimmer boarded the car at Dinwiddie street, in the city of Portsmouth, and one or two blocks further on came inside. In a quarter of an hour, during the period in which the car was traveling two miles, the conductor passed him four or five times, and on one occasion, when he was stooping over and blocking the aisle, he called to him in a jocular way, "Heads up in front!" The record also shows that

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there was at least one vacant seat in the car which Zimmer could have been required to take.

This testimony was certainly sufficient to require the submission of the case to the jury, and from this evidence the jury were justified in inferring that Zimmer was in such an intoxicated condition that he was a source of danger and menace to other passengers on the car; that it was a reasonable inference to be drawn from his condition that just the accident which did happen might occur; and that the conductor either knew of his condition, or in the exercise of proper care ought to have known of it. The principles of law covering such a state of facts are well settled, and the high degree of care which the law imposes upon a conductor of a passenger car under such conditions made it the duty of the conductor in this case to exercise his authority and require the drunken or half drunken passenger to take the vacant seat, or else to take some position in the car where the danger to his fellow passengers would be lessened.

A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen. *Vinton* v. *Middlesex Railroad Co.*, 11 Allen (Mass.) 304, 87 Am. Dec. 714.

We find no reversible error in the proceedings.

Affirmed.

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Richmond.

VIRGINIA TRUST COMPANY, RECEIVER OF RICHMOND AND HENRICO RAILWAY COMPANY v. RAYMOND.

March 15, 1917.

1. STREET RAILWAYS—*Opportunity to Alight.*—In an action for personal injuries to a street car passenger, the declaration contained two counts. The first count charged negligence in not allowing time for the passenger to alight. The second count alleged that the passenger was not allowed a reasonable time after alighting from the car to get out of the way before the car was put in motion. The evidence from the standpoint of a demurrer thereto sustained both counts of the declaration. It showed that after the car had stopped to allow other passengers and the plaintiff to alight, and while plaintiff was in the act of getting off from the front end with one foot on the ground, and was attempting to put the other foot down, the car was prematurely started forward at a rapid rate of speed, and before plaintiff could recover her balance and get out of the way, her clothing was caught by the fender on the rear end of the car as it swung around a curve and overlapped the track, and she was thrown down and seriously injured.

2. STREET RAILWAYS—*Contributory Negligence—Last Clear Chance.*—Under the pleading and evidence in this case, the following instruction was appropriate and correctly propounded the doctrine of the last clear chance: "Even though you may believe from the evidence that the plaintiff was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case, if the jury shall further believe from the evidence that the motorman or conductor in charge of the defendant's car saw, or by the exercise of reasonable care and caution in keeping a lookout could have seen, that the plaintiff was in danger of being struck by the rear end of said car, should said car continue around the curve at Fifth and Louisiana streets, and that said motorman and conductor could have stopped said car by the use of ordinary care and caution in time to have prevented the rear end of said car from striking the plaintiff, but failed to do so, then the jury should find for the plaintiff."

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Error to a judgment of the Circuit Court of the city of Richmond, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Gunn & Mathews and *S. A. Anderson*, for the plaintiff in error.

L. O. Wendenburg and *T. Gray Haddon*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This case is before us on writ of error to a judgment in favor of the defendant in error, the plaintiff below, in an action to recover damages for personal injuries ascribed to the negligence of the plaintiff in error.

The plaintiff was a passenger on the defendant's car, her destination being the corner of Fifth and Louisiana streets, in the city of Richmond.

The declaration contains two counts. The first count charges that after the car had stopped at the point referred to for the purpose of allowing passengers to alight, and while plaintiff was in the act of getting off and before she could safely reach the pavement, the conductor and motorman negligently started the car forward, and thereby, without any negligence on her part, plaintiff was thrown to the ground and injured. The second count alleges that the defendant owed the plaintiff, as a passenger, the highest degree of care to protect her from injury by allowing her reasonable time after alighting from the car to get out of the way before putting the car in motion; and charges that she was a passenger and rang the bell to stop the car at her

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destination; that the car stopped to permit her to alight; that after she had stepped off, and before she had reasonable time to get out of the way of the car, and when by the exercise of ordinary care her peril could have been discovered, and it was apparent that if the car was moved it would strike her, the conductor and motorman in charge negligently started the car ahead and the rear of it caught in her clothes, without negligence on her part, and she was thrown down and injured.

It is sufficient to say of the evidence that, from the standpoint of a demurrer thereto, it sustains both counts of the declaration. It showed that after the car had stopped to allow other passengers and the plaintiff to alight, and while she was in the act of getting off from the front end with one foot on the ground, and was attempting to put the other foot down, the car was prematurely started forward at a rapid rate of speed (as one of the witnesses testified, "The car went around the curve at a very rapid rate, more rapid than I have ever seen a car go around a curve, and I have been living on a curve ten years."), and before plaintiff could recover her balance and get out of the way, her clothing was caught by the fender on the rear end of the car as it swung around the curve and overlapped the track, and she was thrown down and seriously injured.

The instructions given by the court covered every material phase of the controversy. The only error assigned in regard to instructions is to No. 8, which reads: "The court instructs the jury that wherever you are instructed that you may find for the defendant, should it be proven that the plaintiff was guilty of contributory negligence, those instructions are subject to this qualification: that even though you may believe from the evidence that the plaintiff was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case, if the jury shall further believe from the evidence that the motorman or

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conductor in charge of the defendant's car saw, or by the exercise of reasonable care and caution in keeping a look-out could have seen, that the plaintiff was in danger of being struck by the rear end of said car, should said car continue around the curve at Fifth and Louisiana streets, and that said motorman and conductor could have stopped said car by the use of ordinary care and caution in time to have prevented the rear end of said car from striking the plaintiff, but failed to do so, then the jury should find for the plaintiff."

This instruction correctly propounds the doctrine of the last clear chance, and was appropriate under the pleading and evidence. The motorman, who was at the front end of the car, saw the position of the plaintiff, and says she was standing close to the car and he told her to get back so that the rear end would not strike her. "I said watch out for the rear end and motioned with my hand." It was also in evidence that the conductor, who was standing on the step at the rear end of the car saw her peril and motioned to her to get back. And the evidence of the defendant was that she did remove herself to a place of safety, but afterwards walked toward the car and was struck. This theory of the accident, however, was positively denied by the testimony of the plaintiff, whose version of the occurrence has already been given.

The duty of the jury with respect to these conflicting theories was correctly submitted to them for decision, and upon familiar principles their finding cannot be disturbed by this court.

We find no error in the rulings of the circuit court, and its judgment must be affirmed.

Affirmed.

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Syllabus.

Richmond.

WILLIAMS, EXECUTOR, &C. v. BOND AND OTHERS.

March 15, 1917.

1. EXECUTORS AND ADMINISTRATORS—*Execution of Trust—Advice of Court.*—Where property is held under a trust by his testator at the time of his death, which vested in him no discretion as to the time or manner of its disposition, an executor is charged with the duty of "executing the trust or so much thereof as remained unexecuted," under the provisions of section 3419 of the Code, and where a difference of opinion arises between him and the beneficiaries of the trust as to what were the rights of his testator in the matter of compensation, he may seek the aid and advice of a court of equity as to the respective rights of the parties. The subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the executor followed a recognized and approved practice in seeking the aid and advice of a court of equity.
2. EXECUTORS AND ADMINISTRATORS—*Trusts—Compensation of Executor or Trustee.*—When a testator fixes the compensation for an executor or trustee under his will, and the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little as the testator has fixed. In cases where the language of the testator is susceptible of more than one construction, the question becomes one of interpretation which the courts must settle by ascertaining the probable intention and understanding of the parties. Where no compensation at all is named in the will, the rule is that the allowance shall be reasonable, being usually 5 per cent. on receipts, subject to increase or reduction of this rate under peculiar circumstances.
3. EXECUTORS AND ADMINISTRATORS—*Trusts—Compensation of Trustee or Executor.*—Testator gave his executor certain bank stock in trust, and also gave him the sum of $500 as compensation for his services. The executor was the testator's intimate personal friend and legal adviser who drew the will. Notwithstanding this specific bequest of $500 as compensation for his services, the executor collected 5 per cent. commission on

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the first $300 and 2 per cent. commission on the remainder of the book valuation of the bank stock. He also collected 5 per cent. on most but not all of the dividends paid to him under the trust.

Held: That this interpretation of the will by the executor was entitled to no small consideration; and, that what would appear to be the correct interpretation of the will had been put into practical effect by the man whom the testator trusted with its preparation and execution. No further allowance based upon the increased value of the stock at the end of the trust should be allowed.

4. APPEAL AND ERROR—*Costs.*—It is unusual for the court of appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error.

5. EXECUTORS AND ADMINISTRATORS—*Costs.*—Where upon the death of an executor and trustee his executor being charged under Code 1904, section 3419 with executing the trust, in good faith, brings suit to determine the rights of the beneficiaries and his own testator, he is entitled to his costs in the lower court and a reasonable allowance as an attorney's fee. Such a case presents an exception to the practice noted in the preceding syllabus. But as in the case at bar the executor was not the party substantially prevailing upon appeal, he was not entitled to costs in the appellate court.

Appeal from a decree of the Circuit Court of Orange county. Decree for defendants. Complainant appeals.

Amended and affirmed.

STATEMENT BY JUDGE KELLY.

Thomas W. Bond, a prosperous citizen of Orange county, died on January 1, 1904, leaving a will whereby he provided for the division of his large and varied estate among his several children and grandchildren. The following provisions in his will are pertinent to this controversy:

"Third. I give and devise to said John G. Williams, in trust, my one hundred shares of stock in the State Bank of Orange, Orange, Virginia, to be held by him for ten years

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from the date of my death and the dividends on said bank stock for ten years are to be paid one-fifth to each of my five children; * * * At the end of said ten years from my death I give and devise said hundred shares of stock to be equally divided among my five children, if living, and the descendants of any of them that may be dead. * * * Each one of my said children is to have the right during the said ten years to represent twenty shares of said bank stock, and to vote such shares at all the meetings of the stockholders of the said bank."

"Lastly, I nominate and appoint John G. Williams, of Orange county, Virginia, executor of this my last will and testament, and request the court in which it may be probated to permit him to qualify without being required to give security. I give my said executor the sum of $500.00 as compensation for his services."

(Codicil No. 1.) "I, Thos. W. Bond, do make this codicil to my last will and testament bearing date March 11, 1900; I hereby request my children to whom I have given my stock in the State Bank of Orange, Orange, Virginia, to so vote said stock that John G. Williams shall hold the place in said bank now held by me, and I request that said John G. Williams to accept and hold said position during the ten years said stock is to be held by him in trust."

(Codicil No. 2, clause 3.) "The State Bank of Orange having been converted into the National Bank of Orange, Virginia, I hereby give and bequeath my one hundred and twenty-six shares of stock in the said National Bank to John G. Williams, in trust, to be held and disposed of by him, to the same parties, and in the same proportions, as the one hundred shares of stock were disposed of, under the third clause of my said last will and testament, * * * * I hereby make the same request of my children in reference to said stock as was made, in the first codicil to my said

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will, in reference to the one hundred shares of stock in the State Bank of Orange."

The will and the codicils were all wholly in the handwriting of John G. Williams, who had been, for years prior to the death of Thos. W. Bond, his legal adviser and intimate personal friend, and who, on January 4, 1904, four days after the death of Thos. W. Bond, qualified thereunder as his executor.

Within a few months after his qualification as executor, John G. Williams filed his bill in equity in the Circuit Court of Orange county, asking the advice and direction of the court upon certain questions which affected the distribution of the estate, and which he was unwilling to decide upon his own responsibility. To this bill all the parties interested were made parties, and the prayer of the bill, *inter alia*, was, "that the court construe the will and instruct complainant in the due execution of the will * * * and for all other relief, both general and special, as is consistent with equity and the nature of the case requires." The cause, under the style of *Williams, Executor*, v. *Bond*, was regularly matured, and in November, 1904, a decree was entered therein which, among other things, directed that the executor should settle his accounts before a commissioner of the court. These accounts were fully inquired into and reported upon accordingly, and, in November, 1907, a decree was entered which confirmed a final report of the commissioner, recited a full and complete settlement of the estate by the executor, and ordered that the cause be stricken from the docket.

From the executor's accounts, approved and settled as set out above, it appeared that the executor had turned over to himself as trustee the bank stock mentioned in the will and codicils, treating it as cash at a valuation of $22,680, and had paid himself as commission thereon the sum of $462.60, being 5% on the first $300 thereof and 2% on the

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residue; and it further appears from the record in the instant case that the executor also paid himself a commission of 5% upon most, but not upon all, of the dividends actually paid out by the bank semi-annually to the beneficial owners of this stock held in trust by him.

John G. Williams was already a stockholder and was elected a director and president of the bank within a few weeks after the testator's death, holding these positions until his own death occurred in September, 1911. His salary during this period was $100 per year. His influence and counsel were valuable assets to the bank, but his office was an inactive one, and his duties do not appear to have been much more onerous or exacting than those of the other directors who served without salary. The stock of the bank was worth, according to its book value, $181.62 per share when Mr. Williams was made president, and $333.79 per share in January, 1914, at the expiration of the period fixed in the will for the stock to be held in trust. The record does not disclose exactly what its value was when Mr. Williams died.

Lewis C. Williams qualified as the executor of John G. Williams in October, 1911. In the early part of 1915 he brought the instant suit. The bill reviews the transactions of John G. Williams as executor of Thos. W. Bond's estate, shows that the bank stock is in the possession of the complainant, that he has been holding it as trustee since the death of John G. Williams, that the ten year period has expired, that the stock should now be distributed among the parties entitled thereto, asks for instructions from the court in regard to it, and then proceeds to make the following allegations, which embody the gist of the present controversy, to-wit:

"That the said bank stock was not intended and should not have constituted a part of the estate administered by the executor, John G. Williams, but by the terms and effect

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of the will of the said Bond, was intended as a separate trust estate, to be managed independent of the executorship, an account of which was not necessary for the settlement of the executorial accounts.

"That the said John G. Williams, by mistake in settling his accounts as executor on March 6, 1905, before William C. Williams, commissioner in chancery of the Circuit Court of Orange county, in the cause of *Bond, &c.* v. *Bond, &c.*, credited the estate of Thomas W. Bond with the then value of the bank stock, to-wit: $22,680.00, and charged the estate of said Bond in the same account, with a like amount, and with the sum of $462.60, 'John G. Williams, trustee's commission on $22,680.00.'

"That notwithstanding such erroneous and mistaken view of his rights by John G. Williams, executor, your complainant is advised and believes that he is entitled to 5% commission on the value of the said 126 shares of bank stock as of the day of the expiration of the trust, to-wit: on the sum of $42,057.60, as of the 31st day of December, 1913, being ten years from the date of the death of the said Thomas W. Bond and the time set for the expiration of the trust.

"That the said sum to which complainant is entitled should be credited by the sum of $462.60, heretofore paid to John G. Williams, executor, as per the account of William C. Williams, commissioner in chancery, above referred to."

The bill named as defendants the parties entitled to the stock and set out the shares therein which each was to receive. These defendants demurred to the bill, and also answered, contesting the position asserted by the complainant, averring that the executor, John G. Williams, was not entitled to any compensation at all except the $500 mentioned in the will, and that he had improperly paid himself commissions on the bank stock and on the dividends thereon. They claimed, therefore, that they were either entitled to a

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judgment over against the estate of John G. Williams for the aforesaid commissions and accrued interest, or to have the court hold that the suit of *Williams' Ex'or* v. *Bond* was a final and complete settlement, conclusive against all parties thereto.

The cause was regularly matured upon the pleadings already noted and upon the evidence produced by complainant and defendants, and upon a hearing the circuit court, without expressly passing on the demurrer, decreed, "that Jno. G. Williams, Exor. of Thos. W. Bond, had the right to charge the commissions upon the bank stock in the bill and proceedings mentioned, as trustee, as per his settlement in the said suit of *Thos. Bond's Exor.* v. *Bond, &c.*, to-wit, the sum of $462.60, that being 5% on the first $300.00 and 2% on the balance, $22,380.00, of the then value of the bank stock on March 7, 1905, and that the said executor was also entitled to a five *per cent.* commission on the dividends collected on the said bank stock for the period of ten years and no longer, the limitation of his trusteeship under the will of Thos. W. Bond, deceased, or so much thereof as he actually collected and that the residue of the said five *per cent.* commission on such dividends, if any, should be paid to his executor; and doth further decide and decree that the said executor is not entitled to any commission on the enhanced value of the said bank stock or any commission on the dividends accruing thereon after the expiration of the ten years aforesaid, or any additional commission on the *corpus* thereof.

"The court doth further decree, and order, that the defendants are entitled to receive from Lewis C. Williams, executor of John G. Williams, as aforesaid, the certificates of bank stock in the bill and proceedings mentioned: and the court doth order, adjudge and decree that the said Lewis C. Williams, executor as aforesaid, deliver to the said defendants or to Gordon & Gordon and Alex. T. Browning,

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their attorneys, the said certificates of the said shares of stock, to be divided and distributed among the said defendants in accordance with the will of the said Thos. W. Bond, deceased; but the said stock shall not be delivered until the said defendants or their attorneys, pay to the said executor any commissions to which he is entitled under the terms of this decree, if any such there be, the court being of opinion that it is unnecessary to settle any further accounts of the trusteeship of John. C. Williams, deceased, or of the executor of the said trustee, it appearing that the said bank stock is the only unsettled matter of the said Thos. W. Bond's estate.

"And it is further ordered and decreed that the said defendants recover against the plaintiff their costs in this behalf expended."

From this decree Lewis C. Williams, executor, obtained this appeal.

Williams & Mullen and *Shackelford & Shackelford*, for the appellant.

A. T. Browning and *Gordon & Gordon*, for the appellees.

KELLY, J., after making the foregoing statement, delivered the opinion of the court.

The first question confronting us arises upon the contention of the appellees that the appellant's bill should have been dismissed on demurrer, and that, therefore, he has no standing whatever in this court. Treating the demurrer as having been overruled by implication, we are of opinion that the bill contained matter sufficient to warrant the court in entertaining the cause. The stock was in the possession of John G. Williams at the time of his death, and was held by him upon a trust which vested in him no discretion as to

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the time or manner of its disposition. This being true, Lewis C. Williams, under the provisions of section 8419 of the Code, was charged with the duty of "executing the trust or so much thereof as remained unexecuted." There was a wide difference of opinion between him and the owners of the stock as to what were the rights of his own testator in the matter of compensation; and the facts as developed led the circuit court, properly as we think, to sustain in a limited measure the view for which he contended. The subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the complainant followed a recognized and approved practice in seeking the aid and advice of a court of equity.

The next principal question is whether John G. Williams was entitled, as trustee, to any compensation in addition to the $500 provided for in the will as compensation for his services as executor, and, if so, how much. The circuit court held that he was entitled to such additional compensation, and limited the amount to the commission previously collected on that account by Mr. Williams, or his estate, plus 5% on the dividends which accrued and were paid on the stock during the trust period of ten years and from which no trustee's commissions were deducted. This, in our view of the case, was correct.

When a testator fixes the compensation for an executor or trustee under his will, and the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little, as the testator has fixed. In cases where the language of the testator is susceptible of more than one construction, the question becomes one of interpretation which the courts must settle by ascertaining the probable intention and understanding of the parties. Where no compensation at all is named in the will, the rule is that the allowance shall be reasonable, being usually 5%

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on receipts, subject to increase or reduction of this rate under peculiar circumstances. These propositions are not controverted and are well settled. (Code, sec. 2695; *Darling* v. *Cumming*, 111 Va. 687, 69 S. E. 940; *Allen* v. *Virginia Trust Co.*, 116 Va. 319, 82 S. E. 104, 11 Am. & Eng. Ency. L., p. 1304-5.) Applying them to the instant case, there is room for the contention that the testator intended the sum of $500 to cover all the services of Mr. Williams imposed upon him by the will, but we cannot say that this contention is clearly correct, even upon the face of the will and uninfluenced by the interpretation which Mr. Williams placed upon it. This interpretation by him is entitled to no small consideration. He is shown to have been a lawyer of experience and ability, and a man of high character. He was the trusted friend and adviser of the testator, and prepared the will himself. It does not seem improper in these circumstances, and in the absence of any indication to the contrary, to assume that Mr. Williams correctly construed the will when he charged, as trustee, compensation in addition to what was allowed him as executor, and that in doing so he fixed a reasonable sum. It seems to us just and right, upon the face of the record before us, to attribute to him a correct understanding of the purpose of the testator and a faithful compliance therewith. It was clearly his idea that he was entitled to a commission upon the *corpus* of the fund represented by the bank stock, but not as much as five *per cent.* He therefore collected the much smaller sum of $462.60. It was also clearly his idea that upon the smaller amounts of the semi-annual dividends he should receive a commission of five *per cent.* straight, and this he collected upon most of them. All this seems fair and reasonable, and not at all out of accord with the probable intention of the testator as indicated by the terms of his will. In other words, what would appear to be the correct interpretation of the will has been put into practical effect by the

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man whom the testator trusted with its preparation and execution.

We cannot agree, therefore, either with the contention of the appellant that Mr. Williams proceeded upon an "erroneous and mistaken view of his rights," and charged too little, or, on the other hand, with the appellees' contention that he was entitled to no compensation at all as trustee; but we are of opinion, as the circuit court evidently was, that the intention of the testator will probably be carried out and that substantial justice will be done by adopting the view upon which Mr. Williams undoubtedly acted.

We have not overlooked the claim of the appellant that there should be a further allowance based upon the increased value of the stock as of the end of the ten year period covered by the trust, but we do not think there is any substantial foundation upon which to rest such a claim. It is true, as urged by appellant, that Mr. Williams acted as counsel and as president of the bank at a small salary, but he was acting along with the other officers of the bank for the benefit of other stockholders, including himself, besides the Bond estate and there is every reason to suppose that he was, as far as he desired, master of the situation and received a salary satisfactory to himself. His services as president and attorney were chargeable to the bank as a whole, and not to a part of the stock, and he doubtless fully realized and acted upon this principle.

There is one respect, however, in which we think the decree of the lower court should be amended. The trusteeship having regularly devolved upon the complainant, and this suit having been brought in good faith and upon reasonable occasion, the court should have awarded the complainant his costs, and a reasonable allowance as an attorney's fee. (*Cochran* v. *Richmond &c. Co.*, 91 Va. 339, 341, 21 S. E. 664; *Berkeley & Harrison* v. *Green*, 102 *Va.* 378, 381, 46 S. E. 387; *Wilson* v. *Langhorne*, 105 Va. 64, 68, 52 S. E. 841.) We are not unmindful that it is somewhat unusual for this court

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to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars. (*Dillard* v. *Dillard,* 77 Va. 820; *Goodloe* v. *Woods,* 115 Va. 540, 551, 80 S. E. 108). As Judge Staples said in *Wimbish, Assignee,* v. *Blanks, Assignee,* 76 Va. 365, 369, "when this court has determined that the decree of the lower court is right upon the merits, it is not much inclined to interfere with the decision with respect to the costs, unless in a case of palpable error." The present case, however, appears to us to fall within the exception expressly recognized by the opinion in the *Wimbish Case,* and the other cases cited.

We deem it unnecessary, under the circumstances of this case, to remand it for a reference upon the amount to be allowed as counsel fees. The amount, so far as it is to be paid from the trust fund, should not be large. There was reason for the suit, but not, as we think, for the demand over which the greater part of the controversy was waged.

The decree complained of will be amended by directing that the appellant recover of the appellees his costs in the lower court, that he be allowed the sum of $150 as an attorney's fee, and that the bank stock shall not be delivered by him to the appellees until they shall have been paid him, in addition to the commissions they are required by the decree to pay him, the costs and allowance herein awarded him; and, as thus amended, the decree will be affirmed.

We are unable to hold, however, that he is the party substantially prevailing upon the appeal, and therefore, under the mandatory terms of the statute, Code, section 3548, the costs in this court must be awarded to the appellees.

Amended and affirmed.

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Syllabus.

Richmond.

LAWSON V. HOBBS.

March 18, 1917.

1. SALES—*Parol Evidence.*—A contract of sale provided that the subject of the sale, a steam engine, should be delivered f. o. b. Suffolk. It was the duty of the Court to construe the written contract. Parol evidence was inadmissible to show that the contract required the delivery of the engine in Norfolk.
2. F. O. B.—*Sales.*—Where qualifying words are used in connection with the words "free on board" or "f. o. b.," then the contract may be construed to have a different meaning, but where referring to shipments by rail, the words "free on board," or the letters "f. o. b." a certain place, are used, without any other words in the contract indicating a qualification of their meaning, they mean that the subject of sale is to be placed on board cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass to the buyer, and the property be wholly at his risk, and such words are not open to construction.
3. PAROL EVIDENCE—*Contract of Sale—F. O. B.*—Where a contract of sale is f. o. b. a certain point, evidence is admissible to show that it was understood between the parties that certain more specific directions were to be given. As for example, where the contract of sale only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon that point, to permit parol evidence to the effect that the subject of the sale was to be shipped by a certain carrier, destined for the plant of the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. But the case at bar did not depend upon this question, because the purchaser repudiated the contract before the engine reached Norfolk, and there was no contradiction of the vendor's statement to the effect that the carrier would have delivered it free of charge at purchaser's plant.
4. WITNESSES—*Cross-Examination—Reason for Repudiating Contract of Sale.*—A buyer testified that owing to delay in delivery he had been obliged to buy another engine in place of the one contracted for with the seller. Upon cross-examination he was asked what price he paid for this engine. This

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question was proper, both to show the entire transaction, part of which had been introduced in the interest of the buyer, as well as to show the motive which might have possibly influenced the buyer in repudiating his contract.

5. SALES—*Delivery.*—Where a contract of sale required the engine to be shipped "at once," and there was no delay which the utmost diligence of the seller could have avoided, the contract was sufficiently complied with. In this case shipment was made within two days, as soon as the railroad furnished a car.

Error to a judgment of the Law and Chancery Court of the city of Norfolk, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Robert W. Tomlin, for the plaintiff in error.

Henry Bowden, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The facts, so far as they are necessary in order to determine the question here involved, are, that the plaintiff in error, Lawson, was a contractor, and while engaged in doing certain paving work on the streets of Norfolk under a contract with the city subjecting him to heavy penalties for every day's delay beyond the day agreed on for the completion of his contract, had the engine with which he was performing his work to break down so completely as to be incapable of repair. This occurred on Wednesday, October 20, 1915. Negotiations previously begun were thereupon concluded with the defendant in error, L. F. Hobbs, who was a manufacturer's agent engaged in selling engines, machinery, etc., in Norfolk, the result of which was that Hobbs sold an engine to Lawson, which at that time was located in Suffolk.

Their bargain was reduced to writing, and is in the following words and figures:

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"Order No. 173-B-C. Oct. 20, 1915.
"L. F. Hobbs
SHIP TO L. Lawson
AT Norfolk WHEN Once
HOW SHIP Norfolk SALESMAN Hobbs
TERMS: BUYER Lawson
1—A & S Steam engine—50 h. p.—first class rebuilt condition—ready to steam f. o. b. Suffolk.....$500
"(Signed) L. Lawson."

The seller understood that the engine was needed by the purchaser at once, and the purchaser knew that the engine was in a repair shop at Suffolk, twenty miles distant, that a railway car had to be procured, and that it had to be loaded thereon and by the carrier transported to Norfolk. Hobbs admits that before the contract was signed in Norfolk he told Lawson that "if it can be loaded tomorrow, Thursday, it should be here Friday morning."

Hobbs drove to Suffolk in his automobile on Wednesday afternoon, directed the shipment of the engine, and placed the order with the Norfolk and Western Railway Company for the car on Wednesday night. He went with Lassiter, who was Lawson's superintendent, to the Norfolk and Western station in Norfolk on Friday, and was informed that the engine had not arrived. It appears that the engine was not loaded in Suffolk until Friday because the necessary railway car was not furnished until then, and that it reached Norfolk on Saturday. Lawson states that on Friday he told Hobbs that he would not take the engine because he had failed to deliver it on that day, and Hobbs testifies that he did not tell him that on Friday, but that he did so on Saturday. Before the engine arrived in Norfolk, Lawson bought another engine for $380, and refused to accept the engine sold to him by Hobbs because of the delay in the delivery.

The controversy arises chiefly over the effort of the purchaser to introduce evidence to the effect that the contract required Hobbs to deliver the engine in Norfolk at his

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(Lawson's) place of business on Friday, the order having been placed on Wednesday. The court below, however, refused to permit such parol evidence to be introduced, upon the ground that the parties had reduced their contract to writing, that there was no ambiguity therein as to the place of delivery, and that no evidence to vary or contradict it was admissible.

The court was of opinion that "*f. o. b. Suffolk,*" in the contract so plainly indicated the place of delivery that parol evidence could not be introduced to contradict the agreement thereby evidenced. There seems to be no doubt as to the correctness of this ruling.

In the case of *Vogt* v. *Shienebeck,* 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 757, 106 Am. St. 989, 2 Ann. Cas. 814, a similar question was decided. In that case 100,000 feet of one-inch pine lumber was sold f. o. b. cars, Butternut, Wisconsin. The seller claimed the right to introduce parol evidence to the effect that it was understood that the buyer was to furnish the cars, and the lower court permitted the introduction of the testimony. The appellate court reversed the judgment upon the ground that the written contract was plain, saying among other things that, "A sale f. o. b. cars means that the subject of the sale is to be placed on the cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage *in transitu.*" Many authorities are cited in support of this proposition, and it is stated that, "All of such authorities declare that a sale 'f. o. b. cars' so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier, that the term is not open to construction."

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It is not difficult to cite other cases in which the letters "f. o. b." at a designated place, without other qualifying words, as applied to the sale of personal property, have been thus construed, and, so far as we are advised, there is no difference of opinion as to their accepted meaning.

An instructive case in which qualifying words were used is that of *Detroit Southern R. Co.* v. *Malcolmson*, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390. This case construes a contract whereby a coal company agreed to furnish all the coal that might be required for the use of an illuminating company of Detroit for certain purposes, at "the following prices f. o. b. Michigan Central Railroad." The court there held that the place of delivery was at its destination on the Michigan Central tracks in Detroit. Words & Phrases (2d Ser.), Vol. 3, p. 1174.

Where qualifying words are used in connection with the words "free on board" or "f. o. b." then the contract may be construed to have a different meaning, but so far as we are informed there is no dissent from the proposition that where, referring to shipments by rail, the words "free on board," or the letters "f. o. b.," a certain place, are used, without any other words in the contract indicating a qualification of their meaning, the courts have construed them to mean that the subject of sale is to be placed on board cars for shipment, without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass to the buyer, and the property be wholly at his risk, and that such words are not open to construction. *Chandler Lumber Co.* v. *Radke*, 136 Wis. 495, 118 N. W. 186, 22 L. R. A. (N. S.) 713; *Capehart* v. *Furman F. & I. Co.*, 103 Ala. 671, 16 So. 627, 49 Am. St. Rep. 60.

The only case in which the term has been construed by this court, so far as we are advised, is *Aspegren Co.* v. *Wallerstein*, 111 Va. 570, 69 S. E. 957. In that case the seller, under contract to deliver goods f. o. b. New York, loaded the

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cars but gave secret instructions to the carrier not to transport them until further notified; the motive of the seller being to assure himself that the purchase price would be paid. The court there declared that this was a violation of the contract by the seller, and that f. o. b. meant "free on board and ready to go forward at once."

We think that it was the duty of the court to construe the written contract, and that it would have been error to have permitted evidence to so vary, add to and contradict the contract as to make it appear that the place of delivery was at Lawson's plant on the Norfolk and Western in Norfolk, when according to the plain terms of the written contract the place of delivery was at Suffolk.

There is a line of cases upon which the plaintiff in error relies, which in effect permit the introduction of evidence in contracts of this character, so as to show that it was understood between the parties that certain more specific shipping directions were to be given. So, in this case, as the contract only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon this point, to permit parol evidence to the effect that the engine was to be shipped by way of the Norfolk and Western railroad, destined for the plant of Lawson, the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. *Marsteller* v. *Warden*, 115 Va. 353, 79 S. E. 332. The case, however, does not depend upon this question, because the purchaser repudiated the contract, either on Friday or Saturday, before the engine reached Norfolk, and there seems to be no contradiction of the statement of Hobbs to the effect that the Norfolk and Western would have delivered it free of charge at Lawson's plant. It may be that in a proper case such evidence would be admissible. Under the circumstances of this case it was immaterial, and the court properly rejected it.

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We are clearly of opinion that it was the court's duty to construe the written contract, that it properly construed the place of delivery to be on the cars of the carrier at Suffolk, and that the evidence offered tending to show that the place of delivery was to be at the plant of Lawson at Norfolk was properly rejected.

This disposes of all the errors alleged except that referred to in the defendant's bill of exceptions No. 3. Lawson had testified on his examination in chief that on Saturday morning he bought another engine and put it to work on Saturday night. Upon cross-examination he was asked what price he paid for it, and the court required him to answer the question over the objection of his counsel, and this ruling is alleged to be erroneous.

Whatever may have been the motive for introducing the evidence, that he (Lawson) had been forced to buy another engine because of one day's delay in the delivery of the engine he had bought from Hobbs, that testimony had been introduced. From it his counsel were justified in arguing that he did it because of the necessities of his business. It was, therefore, perfectly proper for opposing counsel to introduce evidence that he only paid $380 for it and from this circumstance to argue that he repudiated his bargain because he desired to save $120, the difference between the price of the two engines.

The question was perfectly legitimate on cross-examination, both to show the entire transaction, part of which had been introduced in the interest of the plaintiff in error, as well as to show the motive which might possibly have influenced the plaintiff in error to repudiate his contract.

The contract required the engine to be shipped at once, and there was no delay which the utmost diligence of the vendor could have avoided, and we are of opinion that there is no error in the judgment.

Affirmed.

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Richmond.

TYLER, CLERK OF CIRCUIT COURT v. GARRISON.

March 20, 1917.

1. APPEAL AND ERROR—*In Forma Pauperis.*—Section 3538, Code of 1904, provides that, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party." *Held:* That this section does not apply to appellate proceedings.

Error to an order of the Circuit Court of Prince William county, on a motion against George G. Tyler, clerk of court. Judgment for movant. Defendant assigns error.

Reversed.

R. A. Hutchison, for plaintiff in error.

Bryan Gordon, C. E. Nicol, for defendant in error.

PER CURIAM:

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and argument of counsel, is of opinion that section 3538 of the Code of Virginia does not apply to appellate proceedings. It is therefore considered that the judgment complained of be reversed and annulled, and that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error and supersedeas aforesaid here.

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And this court proceeding to enter such judgment as the said circuit court ought to have entered it is further considered that the plaintiff take nothing by his petition, and that the defendant go thereof without day and recover of the plaintiff his costs by him expended about his defense in the said circuit court.

Which is ordered to be certified to the said circuit court of Prince William county.

Reversed.

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CHESAPEAKE AND OHIO RAILWAY COMPANY v. HUNTER'S ADMINISTRATOR.

January 11, 1917.

Absent, Prentis, J.*

1. DEMURRER TO THE EVIDENCE—*When Overruled.*—Where it appeared from the evidence that there were two aspects of the case in which the jury might have found for the plaintiff, it is not error for the court below to sustain the verdict of a jury and overrule defendant's demurrer to the evidence.
2. DEMURRER TO THE EVIDENCE—*Crossing—Collision.*—In an action to recover damages to an automobile caused by a collision with a freight train, drawn by two engines, at and upon a public railroad crossing, where it appeared from the evidence that the jury might have found that the engineer of the front engine, seeing the automobile stalled on the crossing half-mile away, applied the air brakes immediately, as he testified, and this was in ample time to stop the train, but for the neglect of the engineer of the second engine to shut off steam, or the jury might have disbelieved the testimony of the engineer of the front engine, because in conflict with the testimony for the plaintiff and the physical facts shown, it was not error to overrule the defendant's demurrer to the evidence.
3. EXPERT AND OPINION EVIDENCE—*Appeal and Error.*—Where there was no objection to the testimony of a witness on the ground of his incompetency to testify as an expert, the credibility and weight to be given his testimony are solely for the jury.

Error to a judgment of the Circuit Court of Rockbridge county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

*Submitted before Judge Prentis took his seat.

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J. M. Perry, for the plaintiff in error.

Curry & Curry and *Timberlake & Nelson,* for the defendant in error.

SIMS, J., delivered the opinion of the court.

WHITTLE and KELLY, JJ., concur in result.

This is an action by the appellee (plaintiff in the court below and hereinafter referred to as "plaintiff"), against the appellant (hereinafter referred to as "defendant"), for damages to an automobile belonging to W. S. Hunter, deceased, the plaintiff's intestate, caused by collision therewith of a freight train of the defendant at and upon a public road crossing of the defendant's main line of railway at Bell's Valley station in Rockbridge county.

Upon the trial of the case there was a demurrer to evidence by the defendant and a verdict of a jury in favor of the plaintiff for the sum of $500, with interest and costs, subject to such demurrer. The court below overruled the demurrer and entered judgment on the verdict in favor of the plaintiff. This action of such court is assigned as error here.

In the view we take of the case we need consider only one question, namely:

1. Was the defendant liable for said damages under the doctrine of the last clear chance?

As bearing on this question, the essential facts, ascertaining them under the rule applicable on demurrer to evidence, are as follows:

The automobile was being operated by the wife of the decedent, W. S. Hunter, when it came upon the railway track of the defendant. W. S. Hunter was seated on the front seat to the right side of his wife, with a child about four

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years old in his lap. The automobile was a Maxwell, five passenger car, weighing about 3,000 pounds. The rear seat was occupied by Mrs. Daniels and Mrs. Via and two children, one of the ladies holding one of the children in her lap and the other child, about nine years old, was seated between these ladies. Mrs. Hunter, operating the automobile, was seated on the front seat on the left side. When the automobile was within a few feet of the crossing of the railway, an approaching train was first heard or seen by its occupants. It was then seen by Hunter, who cried out to his wife, "a train is coming." Thereupon she endeavored to stop the automobile before it ran upon the railway track, but failed to do so and did not succeed in stopping it until its front wheels passed over one rail—the south rail—of the track, and ran a little way towards the center of it. As the front wheels dropped over the rail, the engine of the automobile "went dead," was "killed" by the jar, and stopped, and the automobile, after exhausting its momentum and under the influence of the foot-brake, stopped in the position above indicated, partly on the railway track and partly off. There was an incline in the roadway at this point, because of which the rear wheels of the automobile were slightly lower than its front wheels as it stood after it stopped.

Whether the automobile stopped when it did because of the negligence of the plaintiff's intestate, or of Mrs. Hunter, his chauffeur, or of the defendant in failing to maintain the crossing in proper repair, or whether subsequently Hunter was guilty of negligence in remaining too long in a position of danger, trying to roll his automobile off the track, are immaterial, in the view we take of the case, so we need not refer to the testimony bearing especially on those questions, or to the authorities cited in argument bearing thereon.

When the automobile ran up on the track and stopped, Hunter, taking the child which had been in his lap with him, immediately sprang out of the automobile through its

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front door on its right side; at the same time Mrs. Hunter and the two other ladies, taking the two other children with them, also immediately got out of the automobile. The train was then, according to Mrs. Hunter's testimony, "a long way off, * * * I judge about half a mile," approaching from the east going west, *i. e.*, facing the right side of the automobile.

As he got out of the automobile and on getting out, Hunted, with his hat in one hand waved toward the train, put the child he had had in his lap down on the side-track 9.09 feet south of the south rail of the main railway track, came back on the main track in front of the automobile, and facing the train, with his hands and arms upraised, with his hat in one hand, gave the "shut-off" or "stop signal" used by and well known to railroad men, and directed Mrs. Via to wave her red garment (supposed to be a red scarf or sweater) across the track. Hunter then tried to crank the automobile but failed to start its engine.

The railway track from the crossing east was perfectly straight and the engineer and fireman of the approaching train had a full and unobstructed view of the crossing for a mile distance east of it. It was a clear day and in broad daylight when the accident happened. The train was a "double-header," that is, pulled by two large locomotives or engines. The train consisted of 35 cars besides the two engines, composed of 30 cars loaded with cement of 50 tons each, 4 empty steel coal cars, and the caboose.

There was a "hump" or "rise" in the railway track east of the crossing in question, located on the blue print filed by defendant with the record about 2142 feet east of such crossing. This place in the track was plainly discernible to any one looking along the track eastward from said crossing or from the depot platform on the north of the track, also east of the crossing.

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The grade of the railway track from the "hump" or "rise" to the crossing was slightly down grade. The train approached the crossing from the "hump" or "rise" at a speed of 30 to 35 miles and hour, until its speed was checked by the air brakes, and was going at a rate of 18 to 20 miles an hour when it struck the automobile.

Luck, a witness for plaintiff, who was on the depot platform when the automobile came upon and stopped on the railway track at the crossing, testified that he saw the automobile when it stopped, looked toward the approaching train and that the train was then "*beyond* the rise," on the east side of the "rise"—that is, it was then more than 2142 feet away, according to the measured distance of such rise, as shown on said blue print. Luck stated this distance as 9 rails from the crossing to the point on the platform where he was, and 66 rails from him to the "hump" or "rise" in the track, as per his counting of the rails the next day after the accident, when he was giving the claim agent of defendant information asked by latter of him on the subject, making the train then more than 2250 feet away from the crossing (a rail being 30 feet long), according to Luck's testimony.

Luck further testified that when Hunter had waved the shut-off or stop signal and then tried to crank his automobile, he (Luck) then looked towards the train a second time and that the train was then "still beyond the rise," or more than 2142 feet, per said blue print, or more than 2250 feet per Luck's rail count, or about half a mile away from the crossing and from the automobile stalled on the track.

The testimony of plaintiff as to what then ensued is that Hunter, after trying and failing to crank his automobile, waved his hat at the approaching train again (as Mrs. Hunter testified), that he called for help to "try to push the car backwards off the track," told Mrs. Hunter to take hold of the left front wheel, which she did, and he

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took hold of the right front wheel and put his shoulder against the front of the automobile and they pushed the automobile back until its front wheels came against the south rail of the railway track when it stopped and they could push it no farther. Hunter then cried out, "Get out of the way." The front engine of the train was then "beyond the switch," or a little east of the switch, according to Luck, the switch being about 735 feet east of the crossing according to said blue print.

When Hunter cried "Get out of the way," his wife left the wheel she was trying to roll over the railway rail and made her escape from the railway track by running back south of such track. Hunter at the same time tried to make his escape, but found one of his feet caught between the guard rail and the south rail of the track, whereupon, leaning on the front of the fender over the front wheel of the automobile which he had been trying to roll, with his left side towards the approaching train, his back north—very nearly the same position as that in which he had been ever since he tried to crank the automobile and failed and attempted to roll the automobile off the track—he struggled to free his foot, which held him fast. Not seeing her husband when she reached a place of safety, Mrs. Hunter ran around the rear of the automobile in search of him and seeing him in the position mentioned with his foot caught, as stated, she started to go to his rescue, when she tripped over a rail of the side-track and fell. Before she could recover her footing she saw her husband get his foot loose, as the front engine of the train was almost upon him and at that instant she saw him leap backwards and toward the north side of the track. She thought he had escaped but the engine struck him on his left side, threw him some ten or twelve feet high and some eighty feet distant west of the crossing to the north side of the track, killing him instantly, and struck the automobile at the same time and threw it to the south

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side of the track about eighty feet west of the crossing, practically demolishing it.

The red garment was meanwhile being waved by Mrs. Via, standing on the side-track, south of where Hunter was, from the time he told her to wave it until the front engine of the train was within about 180 feet of the automobile and Hunter.

It will be observed that when the automobile stopped upon the track, and its chauffeur and all its passengers were leaving, or had left it, and Hunter gave the stop signal to the approaching train, the automobile being a large car of some 3,000 pounds weight, it was in itself obviously a dangerous obstruction on the track; and it was clearly the duty of the defendant, after it was seen by the engineer or fireman of the front engine of the train, to use every reasonable effort to stop the train or bring it under such control as to be able to stop it before it should reach the automobile, unless the latter was removed from the track before the train reached it. Such effort, as shown by the testimony of the said engineer and fireman themselves, would have included in the situation and under the circumstances thus presented the shutting off of the steam from the engine, the putting on of the air brakes, the sanding of the track as soon as could reasonably be done after such engineer or fireman saw the automobile on the track, and also the shutting off of the steam from the second engine as soon after its engineer felt the air brakes had been put on as could reasonably be done.

As the learned judge of the court below says in his opinion given following the first trial of the case of *L. E. Hicks, Admr. of W. S. Hunter* v. *C. & O. Ry. Co.*, argued before this court along with the case we are now considering, in reference to the signal of Hunter to the engineer to stop, "That was notice to him that the automobile was on the track and might be destroyed * * *" As the same learned

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judge says in his opinion given following the second trial of the case of *L. E. Hicks, Admr.*, v. *C. & O. Ry. Co.*, next above referred to, "The evidence of the plaintiff is that Hunter immediately signaled the approaching train to stop and that at the time he so signaled it, there was yet time for it to have done so and have avoided the accident altogether."

At no time after the automobile stopped on the track did its obvious situation change as to its being a dangerous obstruction on the track until it was struck by the train. That it was such an obstruction and called for immediate efforts on his part, such as above stated as being included within the duty of the defendant towards stopping or getting the train under control, was recognized and acted upon by Hinebaugh, the engineer of the front engine, as he says in his testimony, *immediately* upon his seeing the automobile on the track at the crossing and its passengers jumping out. He admits that he saw it at the point of time when its passengers were jumping out and says that he *immediately* applied the air brakes, sanded the track, began to sound the danger signal of quickly successive short blasts of the whistle. On these subjects he testifies as follows:

"* * * I saw an obstruction on the track and I stuck my head out of the window to take a good look and saw it was some kind of vehicle on the track; I didn't know whether it was a car, buggy or what it was when I first saw it, only I saw the passengers jumping out all around the car."

"Q. Were the people you saw jumping out of the car? A. Yes, sir, they were jumping out of the car when I saw them.

"Q. What did you do? A. I applied my brake in the emergency immediately and began to sound the danger signal. * * *

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"Q. As I understand you, then, as you turned around you saw a vehicle on the track? A. Yes, sir.

"Q. And as you saw it you saw people getting out of it? A. Yes, sir.

"Q. You at once applied the emergency? A. I applied the emergency brake just as quick as I could; it was right at my side and it only takes a thought to apply it.

"Q. Then what did you do after putting that emergency on? A. I began to sound the danger signal.

"Q. What is the danger signal? A. Successive short blasts of the whistle.

"Q. Go ahead and tell what occurred. A. I saw the gentleman come around the end of the car and he walked out near the north rail and gave me a signal just like this (illustrating) just one time.

"Q. The man there at the car, then, gave you a signal: what did that signal mean? A. It was a stop signal.

"Q. Did you see anybody else waving to you? A. No, sir; my attention was attracted absolutely to that man for I saw the dangerous position; immediately after giving that signal he dropped down in front of the car, placed his shoulder against the front of his car to push it off the track, and my attention was attracted to him from that on; he was a man absolutely in danger.

"Q. What else did you do on that engine in order to stop? A. Applied the brake and opened the sand was the only possible thing I could do. * * *

"Q. Had you cut off or not? A. I shut off.

"Q. When did you shut off? A. When I first saw the obstruction.

"Q. After you first put on the emergency or afterwards? A. I shut off first.

"Q. What is your usual order of putting on your emergency brake or air; do you shut off first and put on the air

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afterwards? A. Yes, sir; shut the steam off and then apply the brakes.

"Q. So, as you went down there you were without steam, you had your emergency on, and you were sanding the track? A. Yes, sir."

Fultz, the fireman of the front engine, says in his testimony on this subject as follows:

"Q. Where were you when you first came in sight of the crossing; I mean where were you sitting? A. On my seat box on the left side.

"Q. What were you doing? A. I was looking ahead.

"Q. Did you see these people on the track before Mr. Hunter was struck? A. Yes, sir. * * *

"Q. What did you see when you first saw them, did you see them when they came on the track? A. Yes, sir, I seen them when the car run up and stopped. * * *

"Q. You saw the car stop? A. Yes, sir.

"Q. Then what happened? A. Well, it seemed like the ladies or women was jumping out, and it seemed like they threw wraps out or something like that, red, looked like they were thrown up in the air; I seen the ladies get out of the car and also seen one man get out of the car.

"Q. What did you do in the meantime? A. Well, as soon as I seen this I started to holler to the engineer.

"Q. Where was he? A. He was on the seat box, and just as I fixed to holler he threw his brakes in emergency; of course, the brake valve makes quite a fuss; I knew there was no use to holler as soon as I hear him throw the brake in emergency, I knew there was no use, he seen them. I seen him raise up in his seat box and look out ahead, and I raised off my seat box and began ringing the bell; I never said a word to him; I knew he did all he could when he threw the brake valve in emergency. * * *

"Q. What happened, now, from the time this emergency went on on to the end of the business? A. Well, the ladies

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jumped out of the car; they went this way (indicating) and the man went the other way, went over and looked as if he was pushing at the car to get off the track; he pushed at it a short while and run in between the wheels of the car, and I supposed he was taking the brake off; I was standing there ringing the bell living in hopes he would get the car off; after he run in between the wheels and did a little something in there, he didn't stay but an instant, just so quick, you know, you could hardly know he had been there, he ran around and got against the car in the front end and began pushing just like that; it looked as though he had just got it started the last glimpse I got of him; of course, I couldn't see Mr. Hunter when he was hit at all, but we were close as from here to the door the last time I seen Mr. Hunter.

"Court: What was he doing at that time? A. Looked like he was down pushing against the head or fender, something like that; he was crouching over in that position, looked as if he was trying to push the car off; I thought he had the car off. * * *"

CROSS-EXAMINATION.

By Mr. Timberlake:

"Q. Did you maintain a lookout for that crossing as you approached it? A. Yes, sir.

"Q. You maintained a constant lookout? A. Yes, sir.

"Q. Now, you can see that crossing for a distance of about a mile, couldn't you? A. Yes, sir; every bit of it.

"Q. And if you had seen an automobile stalled on that crossing with people getting out of it you would have regarded that as an immediate notice of danger which would have required you to stop? A. Sure.

"Q. That would have presented a condition of affairs to you that showed you the necessity of stopping? A. Sure.

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"Q. And you tell the jury now that you maintained an uninterrupted lookout from the time you first came in sight of this crossing until this accident occurred? A. Yes, sir. * * *

"Q. You saw the red scarf or garment thrown up? A. Yes, sir.

"Q. And you saw people standing around the car? A. I saw them getting out of the car."

The testimony for the defendant was that the train could and should have been stopped on this occasion, and its witnesses claimed that it was in fact stopped, 1200 feet from the point at which the air brakes were put on.

A witness for plaintiff testified that the train could have been stopped within 800 to 900 feet from the point at which the air brakes were put on, but the learned judge of the court below held that the testimony of this witness must be disregarded because he based his testimony on only one instance in his experience when conditions did not approximate those existing in the case at bar, and further because such testimony was in conflict with the known laws of physics. Without passing upon the correctness of this holding, we will disregard the testimony of this witness in the case and consider the fact to be that the train could and should have been stopped within 1200 feet of the point at which the air brakes were put on, if the engineers of the front and second engines exercised reasonable care and diligence in their efforts to stop the train thereafter.

Concerning the question as to whether such reasonable care and diligence were exercised by the engineer of the second engine, there is a conflict between the testimony for the plaintiff and for the defendant. This conflict is in regard to when the steam was shut off from the second engine.

Phillip Moore, a witness for plaintiff, testified as follows:

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"DIRECT EXAMINATION.

By Mr. Curry:

"Q. Mr. Moore, where do you live? A. I live at the old stone quarry at Bell's Valley.

"Q. How far do you live from the railroad? A. Something about 250 yards, something like that.

"Q. On the south or north side of the track? A. On the south side of the track.

"Q. On the southeastern side, I believe, is it? A. Yes, sir, the southeastern side of the track.

"Q. What is your occupation? A. Engineer.

"Q. How long have you been an engineer? A. All my lifetime.

"Q. You are a stationary engineer? A. Yes, sir.

"Q. You have been running engines all your life? A. All my lifetime been around engines.

"Q. You have worked, then, on railroads, too? A. Yes, sir, some.

"Q. What did you do on the railroad? A. Firing.

"Q. Are you familiar with the working and running of engines? A. Very much so.

"Q. Can you stand off and look at an engine and say whether it is in power or not? A. Yes, sir.

"Q. A locomotive running on the track? A. Yes, sir.

"Q. Can you tell whether the steam is on or not? A. Very likely, yes, sir.

"Q. Well, is there any doubt about you being able to tell it? A. No, there is no doubt about it that my eyes would deceive me that much that I couldn't tell.

"Q. Now, do you know about the time, or the time Mr. Hunter was killed at Bell's Valley? A. The 27th day of September.

"Q. What year? A. 1914.

"Q. Was it Sunday or what day? A. Sunday.

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"Q. Did you see him when he was struck? A. No, sir.

"Q. Did you see the train when it passed the point where he was killed? A. I seen it after it passed the point.

"Q. How many engines were there, more than one engine to the train? A. There was two.

"Q. Where did you first see the engine? A. When it passed the crossing a piece.

"Q. Where were you when you saw it? A. I was over there close to my house.

"Q. Now where is that with reference to the crossing? A. Well, that would be just about southeast just as near as I could tell you, and about 250 yards from the railroad.

"Q. Then, you were on the lower side as we generally speak of it going west? A. Yes, sir.

"Q. Do you know whether the engines, after they passed that crossing, or when they passed that crossing, were cut off? A. The front engine was cut off, shut down entirely, but the second engine wasn't.

"Q. How do you know that? A. I could tell by the moving of the engine, by the smoke and the sound of the exhaust.

"Q. And the sound of the exhaust? A. Yes, sir.

"Q. Was it cut off at all? A. The second one?

"Q. Yes. A. No, sir, he was working at full power.

"Q. How far did it go? A. Well, as near as I could tell along about four or five or six rails, something like that.

"Q. After it passed the crossing? A. After it passed the crossing.

"Q. Did you see the accident? A. No, sir.

"Q. You were not in a place to see that? A. No, sir, I wasn't in place to see that.

"Q. How did you happen to notice that the front engine was cut off and the second wasn't? A. After the danger whistle was blowed I knew there was something up and I come up to the hill there where I could see across and I made up my mind if they done anything they will certainly

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shut down, and I made it strictly a point to look at the engines when they passed me to see whether they were both shut off or not and I looked and seen the first one shut off and the second still working for a piece and finally shut off too.

"Q. And he shut off about how many rails after he passed the crossing? A. Four or five or six; it was done so quick I couldn't tell exactly."

CROSS-EXAMINATION.

By Mr. Perry:

"Q. You say you have worked with engines all your life? A. Yes, sir.

"Q. What has been your experience with engines? A. Well, I have run engines.

"Q. On what road? A. I haven't run any on the road.

"Q. You have never run a railroad engine? A. I have fired.

"Q. You fired a railroad engine when? A. About twenty-five years ago.

"Q. On what road? A. C. H. & D.

"Q. That is the Cincinnati, Hamilton and Dayton? A. Yes, sir.

"Q. How long did you fire for them? A. I should judge something along about close on to a year.

"Q. Twenty-five years ago? A. Yes, sir.

"Q. Now how is it you tell whether an engine is cut off or not? A. When I was looking at it I could see the engine was working; you could tell by the exhaust, by the smoke coming out of the stack and by the sound of the exhaust.

"Q. What makes you say, then, this second engine was not shut off is the fact that you could see smoke coming out as if it was being exhausted? A. You could hear the exhaust too.

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"Q. You could hear the exhaust? A. Yes, sir.

"Q. What could you see about the steam? A. You can tell by the working of the steam passing out through the stack whether the engine was pulling.

"Q. You could hear it puffing, could you? A. Yes, sir.

"Q. Do you mean to say you heard the engine puffing? A. Yes, sir.

"Q. Do you know whether the engine was reversed? A. Very likely he wouldn't exhaust by being reversed.

"Q. Why not? A. He might have, but it didn't look to me like it was.

"Q. The exhaust runs one way just the same as the other, and don't you know that? A. No, I don't know.

"Q. Don't your engine exhaust in exactly the same way whether you are going backwards or forwards, isn't the whole thing worked, and the motion of the pistons, precisely the same whether the engine is going backwards or forwards; isn't that a fact? A. Yes, yes, so far as the works is concerned.

"Q. So, so far as you know, the exhaust you saw that evening might just as well have been from a reversed engine as from an engine going forward? A. Yes; it was too far up for me to tell, but I thought he was pulling.

"Q. You thought he was pulling because it was a good piece away from you and he was going fast? A. Yes, the engine was working, that is all I could tell you, the engine was working one way or the other.

"Q. Do you know anything about a mechanical stoker? A. I haven't run any of them.

"Q. You don't know whether these engines had mechanical stokers on or not? A. I didn't pay any attention to the stokers.

"Q. You don't know whether that engine had a stoker or not? A. No, sir.

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"Q. You don't know whether the stoker was running or not? A. It don't throw smoke out like it would if the engine was working.

"Q. How far to the southeast of this road crossing is your house where you were? A. I was just about 250 yards from the railroad crossing.

"Q. You were 250 yards southeast of the railroad crossing? A. Yes, sir.

"Q. And this train was going west? A. Yes, sir.

"Q. And you didn't see the train until just after it passed the crossing? A. I didn't pay no attention to it, didn't know there was anything about it until I heard the danger whistle.

"Q. You heard the danger whistle? A. Yes, sir.

"Q. Blowing a right smart? A. Yes, sir.

"Q. You were behind the house when you heard it? A. No, sir, in front of it.

"Q. How far did you run in order to see what was happening? A. The length of this room here.

"Q. That is about 45 feet? A. Something like that.

"Q. Right towards the railroad? A. Yes, sir.

"Q. Did you get 45 feet nearer the crossing by running that way? A. Yes, sir.

"Q. And when you got to that point you could see the engine just passing the crossing; is that right? A. Yes, sir; he was a little past the crossing before I seen it; he was just a little bit past the crossing when I got there.

"Q. That is, the first and second engines? A. Yes, sir.

"Q. And from that you concluded the engine had power on? A. Yes, and by the sound of the exhaust.

"Q. And by the sound of the exhaust? A. Yes, sir.

"Q. Now, what other signs were there? A. That is about all.

"Q. That and the speed? A. Yes, sir.

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"Q. Yet, you have already said you couldn't tell whether the power was on in reverse or forward motion? A. The engine was in working order one way or the other, forwards or back.

"Q. He stopped very quickly after that, didn't he? A. About four or five rails, something like that; he quit throwing out the smoke and exhaust.

"Q. You saw Mr. Hunter after he was killed? A. Yes, sir.

"Q. Did you look at all at his injuries? A. Well, now, I didn't pay much attention to his injuries, but I was the man that partly took care of him when he was there; I laid him down, kind of put his feet together and his arms.

RE-DIRECT EXAMINATION.

By Mr. Curry:

"Q. Now, was that second engine running like the first engine or differently? A. Oh, yes, he was pulling, he was working.

"Q. Now, were the wheels running backwards and catching, or were they running forwards? A. They looked to me like they were running forwards.

"Q. Now, when an engine is reversed, why they run the wheels backwards and catch and skid, don't they?

"(Objection.)

"Court: Just tell how the drivers were moving. A. As near as I could tell the engine was in full working order and was running forwards.

"Q. We asked you how the drivers move when an engine is reversed? A. They run backwards, they work back action, they work against the engine then.

"Mr. Curry: These were not running backwards. A. It didn't look to me like they were running backwards.

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"Court: Could you see them to tell? A. It looked to me like the drive rods were running in the same direction, I was watching the driving rods on the side.

"Mr. Timberlake: The only difference between the two engines was the front was cut off and the other was not. A. He was cut off, but the second wasn't, the second was pulling.

"Q. Is that a matter that can be readily seen by anybody looking at the engine, very easily told? A. Very easily; it can be seen.

"Mr. Perry: Q. How do you know she was pulling? A. Well, I couldn't see any way but what she would be pulling.

"Q. You come back to the same thing, that you saw the exhaust and heard the exhaust, and therefore think she was pulling? A. Yes, sir; and while I was watching the engine the driving rods looked like they were working in the same direction.

"Q. You couldn't see the spokes in the wheels? A. No, sir.

"Q. Don't the driving rods go in exactly the same direction whether the engine is going forward or backwards? (No response.)

"Mr. Perry: Stand aside."

The testimony in the case shows that as a matter of fact the second engine *was not reversed*—so that did not explain the appearance of exhaust testified to by Moore.

In regard to the testimony of Moore, the learned judge of the court below says in his opinion after the first trial of the case of *L. E. Hicks, Admr.*, v. *C. & O. Ry. Co.*, above referred to: "Mr. Philip Moore in direct examination says that the power was not cut off of the second engine promptly, but his cross-examination shows that he has no sufficient reason for this statement."

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In the opinion above mentioned, after the second trial of the case just referred to, the same learned judge on the subject of this testimony of Moore says:

"It is also said that the railroad was negligent in that the power from the second engine was not cut off; indeed, that it was not cut off until that engine was four, five, or six rail lengths beyond the crossing (p. 88). At page 93 the witness was asked:

" 'Q. How do you know she was pulling? A. Well, I could not see any way but what she would be pulling.

" 'Q. You come back to the same thing, that you saw the exhaust and heard the exhaust, and therefore think she was pulling? A. Yes, sir, and while I was watching the engine the driving rods looked like they were working in the same direction.

" 'Q. You could not see the spokes in the wheel? A. No, sir.

" 'Q. Don't the driving rods go in exactly the same direction whether the engine is going forward or backward? (No response.)'

"A very rapid exhaust does show that a locomotive is pulling, but frequently there is an exhaust from an engine when the train is standing still, due, it is believed, to some manipulation of the air, but however that may be, this fact remains and is one of common knowledge, and the sound is the same, but does not approach that of an engine pulling hard up grade.

"But if we assume that this evidence on demurrer is sufficient to show that the power of the second engine was not cut off, yet the fact remains that this engineer never saw nor could see Hunter. His view was cut off by the front engine. And if he had seen him he was entitled to the same presumption that the engineer of the first engine was, namely, that Hunter would remove himself from his place of peril in ample time.

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"But whether the power from the second engine was cut off or not, the emergency brakes had been applied to it, and there is nothing to show the propelling power of an engine independent of its momentum in such circumstances.

"As a matter of fact, did the train stop with a due promptness when the emergency brakes were applied? The defendant's evidence shows that it did—that a good stop was made."

As was said by this court in the case of *Arminius Chemical Co.* v. *Landrum*, 113 Va. 7, at page 21, 73 S. E. 459, at page 466 (38 L. R. A. [N. S.] 272, Ann. Cas. 1913-D, 1075), in regard to the testimony of Maury, so we say in regard to the testimony of Moore in the case now before us: "* * * we cannot say that it clearly appears that he was not a competent witness * * *"

There was no objection to the testimony of Moore in the case now before us on the ground of his incompetency to testify as an expert; therefore, the credibility and weight to be given his testimony was solely for the jury. The jury may have drawn a different conclusion from this evidence from that drawn by the trial judge, or by us had we been upon the jury.

Grove, the engineer of the second engine, a witness for the defendant, testified that he knew the moment the front engineer put on the air brakes, and that he shut off the steam from the second engine "not very far" after that. Now, under the rule applicable as on demurrer to evidence, the testimony of Grove must be disregarded on this point because in conflict with that of Moore and the jury might have found, if they believed the testimony of Moore to be correct, that the second engine was not shut off promptly following the putting on of the air brakes, but that such engine was pulling under a full head of steam until after the front engine had struck the automobile and passed the crossing from five to six rails, or from 120 to 180 feet. We

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cannot agree with the trial judge that the absence of express evidence as to the effect of the non-shutting off of the second engine leaves the case as if the second engine had been promptly shut off. It seems to us that the known laws of physics must of necessity have been in operation in such a situation and the stopping power of the air brakes upon the train must have been neutralized precisely to the extent of the pulling power of the second engine. That power was one-half of the power which pulled this heavy train and hence must have been tremendous. Knowledge of precisely what such power was and its effect upon the braking power of the air brakes, so as to neutralize the effect of the latter and to what extent it would neutralize such effect, was peculiarly within the knowledge and in the possession of the defendant, and as it introduced no evidence on the subject, we cannot say that the jury were not warranted in finding that it had a great effect in delaying the stopping of the train after the air brakes were put on (see *Goodman* v. *Richmond &c. R. Co.*, 81 Va. 576; *Copperthite* v. *Loudoun Nat. Bank*, 111 Va. 70, 68 S. E. 392, as to principle referred to); and if they believed from the evidence for the plaintiff that the train was approximately half a mile or 2640 feet away when the automobile first came on the track, and that it was approximately 2250 feet away when the front engineer saw and realized the situation, and if they believed from the front engineer's testimony that he then put on the air brakes, the jury may have disregarded that part of the testimony of such engineer which related to the location of the train on the track when he put on the air brakes, as in conflict with his own testimony that he put on such brakes immediately following the jumping out of its passengers from the automobile, and have believed that the front engineer in fact put on the air brakes when the train was some 2250 feet from the crossing, or if not that precise distance at a sufficient distance to have stopped the train be-

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fore it reached the crossing; and that the neglect of the engineer of the second engine to shut off the engine promptly after the air brakes went on, and the consequent pulling of the second engine under a full head of steam, with the track sanded as it was, until the front engine had struck the automobile and passed the crossing 120 to 160 feet, delayed the stopping of the train and was the proximate cause of the accident. If the jury might have so believed from the evidence and absence of evidence peculiarly within the power of the defendant to produce, the court below should have so held, and this court must so hold. *Citizens Bank* v. *Taylor*, 104 Va. 164, 51 S. E. 159; *Richmond City* v. *Barry*, 109 Va. 274, 63 S. E. 1074, and other cases of this court on this point.

There is practically no conflict between the testimony for the plaintiff and defendant as to what occurred at the crossing after the automobile came on and stopped upon the track; and there is no conflict between such evidence as to the fact that the defendant's servant, the engineer of the front engine, saw the automobile on the track as soon as he reasonably could have seen it, that is, the instant after it stopped and while its passengers were yet getting out of it, and correctly apprehended the situation on the crossing at once and acted immediately as he should have acted; nor is there any conflict between such evidence as to the fact that the fireman of the front engine saw the automobile the very instant it came on the track, and that before he could call out to the engineer of such engine the latter had put on the air brakes, etc. It is not claimed or suggested in the testimony of such engineer or fireman that they or either of them acted upon any expectation that the automobile would be removed from the crossing before the train reached it, unless the latter was stopped, or that a collision could have been avoided save only by stopping the train. On the contrary they both testified that it was a case as they saw it

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from the time the automobile stopped on the track, on to the end of the tragedy, for the utmost effort on the part of defendant to stop the train before it reached the automobile, and that from the very instant of time that the automobile had stopped and its passengers were jumping out, the brakes were put on, the track then sanded, etc. Now, if this had been done when the train was approximately half a mile away from the crossing, or 2250 feet, or 2142 feet, or more than 1200 feet away, the preponderance of evidence is clearly that the train would have been stopped before the collision with the automobile, if the second engine had been shut off when its engineer testified it was.

There is a conflict of evidence on the question of fact, which is the turning point in the case, as to how far away the approaching train was when the automobile stood on the crossing with its occupants jumping out, or out of it, and Hunter was giving the stop signal.

The testimony for the plaintiff on this point has been noticed above, to the effect that the train was at least more than 2142 feet, or nearly half a mile, away from the crossing at this turning point of time or distance in the case.

The testimony of two witnesses for the defendant, Mrs. Clayton and Miss Burke, corroborates that for the plaintiff as to the distance the train was away when the automobile stopped on the track and the passengers were jumping out, when considered in connection with the testimony of a number of witnesses for defendant as to the blowing of a single long blow for the station, next two blasts of the whistle for the crossing, and next the danger signal of frequent short blasts. The engineer of the front engine and its fireman and several other witnesses for defendant testify that the whistle for the station was blown at the station whistle board or post, which the evidence shows was "a little less than half a mile from the station," and hence was about a half mile east of the crossing. Mrs. Clayton and Miss

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Burke both testify that while they were not in sight of the train they were of the automobile when it stopped and its passengers were jumping out, and that at that instant of time they heard the single long blast of the whistle, and *afterwards* the two blasts for the crossing, and *after that* the danger signal; and that upon hearing the first long whistle one thought "they will be killed" and the other remarked, "It has stopped on the track and the train is coming," which fixed the time of their hearing this long blast, and fixed the time that the fireman saw the automobile come on the track, as the time when such long blast was blown, and the time when the engineer of the front engine put on the air brakes, as immediately following the long blast of the whistle, which in turn fixed the location of the train when the air brakes were put on at approximately half a mile away from the crossing.

The remaining testimony in the case as to when the air brakes were put on is that of the two witnesses, the engineer and fireman of the front engine, Grove the engineer of the second engine, and Goodbar, a brakeman; all of whom testified that the air brakes were put on just about the east switch, or a little east of the east switch, which is 735 feet east of the said crossing, and the engineer and fireman of the front engine fix this as the location of the train on the track when they first saw the automobile. Such testimony of such engineer and fireman was in conflict with their own testimony, as above noted. All of such testimony was also in conflict with the inference which might fairly be drawn from the testimony for plaintiff as to the distance the train was away when the automobile stood on the track, at the time when said engineer and fireman admit they first saw it, and when they say the air brakes were put on—hence, it must be disregarded upon demurrer to evidence. Therefore—

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The jury may have found that the seeing of the automobile and its situation on the track at the crossing by the engineer of the front engine was just when the passengers were jumping out of it, as he himself testified, and that he put on the air brakes immediately, as he testified, when the train was approximately half a mile away, and that this was in ample time to stop the train so as to prevent the collision and would have prevented it but for the neglect of the engineer of the second engine to shut it off, or the jury may have disbelieved the testimony for the defendant, that the air brakes were put on, the track sanded, etc., immediately following the seeing of the automobile in the situation above noted by said engineer and fireman of the front engine, because in conflict with the testimony for the plaintiff, the physical facts shown thereby and the inference fairly to be drawn therefrom that if this had been done it would have been done when the train was approximately half a mile away and the train would have stopped before reaching the crossing, and have yet believed the testimony for defendant of the said engineer and fireman, that they saw the automobile at the period of time when it was in the situation aforesaid, which was not in conflict, but in accord with the testimony for plaintiff, and testimony of Mrs. Clayton and Miss Burks for defendant.

Hence, there are two aspects of the case in which the jury might have found for the plaintiff. In either aspect the court below was right in sustaining the verdict of the jury and overruling the demurrer to evidence.

We, therefore, find no error in the judgment complained of and it will be affirmed.

Whittle and Kelly, J. J., concur in result.

Affirmed.

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Syllabus.

Wytheville.

ATLANTIC COAST LINE RAILROAD COMPANY v. CHURCH.

June 14, 1917.

Absent, Burks, J.*

1. CROSSING—*Contributory Negligence—Absence of Sign—Evidence of Abandonment.*—A railroad track across a highway is itself a proclamation of danger, and travelers approaching such crossing on the highway must exercise proper precautions for their own safety. Even though the company may be guilty of negligence, the traveler can not recover if his own neglect to take such proper precautions proximately contributed to his injury. In order to constitute such proclamation of danger, however, the company must not do, or omit to do, anything which is likely to disarm the traveler and reassure him of his safety. The reason of the law fails if the tracks in fact and beyond all question have been abandoned. If the rails were so covered with earth as not only to be invisible on the highway bed, but to convey the impression that the track was not in use by trains; if, in addition to this, the rails themselves were rusty, obscured by vegetation growing close to them; and if there was no crossing signal board, as required by Code of 1904, section 1249-d, sub-section 49; then these combined circumstances presented a question to be submitted to the jury to determine whether or not a prudent man exercising due care commensurate with the danger to be apprehended, in approaching such a track, would apprehend danger, or would feel assured of his safety because of the absence of the crossing sign, together with such other surrounding conditions.
2. CROSSINGS — *Abandonment of Road.* — Concealed, dirt-covered, small and rusty rails, with undergrowth near the railroad track on a much-traveled dirt highway, are insufficient to justify the assumption that the railroad track had been abandoned; but when the impressions created by these indications of abandonment were confirmed by the absence of the warning sign, which is both customary and required by the statute,

*Case submitted before Judge Burks took his seat.

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it can not be maintained as a conclusion of law that the court erred in submitting the question to the jury.

3. CROSSINGS—*Sign—Sub-Section 49 of Section 1249-d, Code of 1904.*—Defendant railroad company was guilty of negligence in failing to construct and maintain the proper signal board at the crossing where plaintiff was injured, as required by sub-section 49 of section 1249-d, Code of 1904. This provision is mandatory and requires crossing signs to be erected and maintained. The object of the statute is to protect human life, and as the injury to the plaintiff was especially such as the maintenance of the sign board was intended to prevent the pesumption arises that the injury may have been caused by such neglect, unless the plaintiff's own fault is manifest. Whether this negligence was or was not the cause of the injury must be determined from all the facts and circumstances of the case.

4. NEGLIGENCE—*When Question for Jury.*—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ, as to the negligence charged, the question is not one of law, but one of fact to be determined by the jury under proper instructions from the court.

5. APPEAL AND ERROR—*Harmless Error—Failure to Instruct as to Burden of Proof.*—In an action for personal injuries against a railroad company, the court, through inadvertence, failed to read an instruction to the jury, referring to the burden of proof, which the court at the request of the defendant intended to read. The court certified, however, that the case was argued before the jury by the opposing attorneys upon proper assumptions as to the burden of proof as stated in the instruction.

Held: That while such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, yet as it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof, there is no reason to suppose that the railroad company was injured by the inadvertence of the judge.

Error to a judgment of the Circuit Court of Nansemond county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

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Wm. B. McIlwaine and *Bernard Mann,* for the plaintiff in error.

Mann & Tyler, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

Luther M. Church, while driving an automobile with the curtains closed because it was raining, was injured on the 2nd day of June, 1915, by a backing train at a public road crossing of a short spur of the Atlantic Coast Line Railroad Company, known as Beech Grove branch. This spur was a short line of railroad track operated for the purpose of gathering up farm produce for shipment from Driver's. The schedule of trains thereon was one train a week in the month of January, every Wednesday; three trains a week from February 1st to May 15th; one train a day, except Sunday, from May 16th to July 24th; and one train a week from July 25th to December 31st. If the business required it, the train would be operated each day so long as it was necessary.

Church had known of the crossing when he was a boy, from the time he was seven years old until he was twelve. He left the neighborhood at that time and knew nothing about it until about fifteen years later, when, in July, 1914, having returned, he as a traveling salesman for a Norfolk house, began to travel over the crossing, and had crossed it twelve or fifteen times during the eleven months which elapsed between his return and the time of the accident. He testified that each time he went over the track he found it so covered with dirt that no sign of the rails was visible at the crossing; that the rails on either side of the crossing were small, rusty, and did not look like they were used at all, and because of the bushes and undergrowth near them

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could not be seen except at a point very near the crossing; that he never saw any trains or cars at or near the crossing; that there was no crossing sign there; that from these facts he reached the conclusion that the track had been abandoned and was no longer being used for the operation of trains; and that having reached this conclusion he did not exercise any care in approaching the track. He is sustained by two other traveling salesmen, who testify that they crossed the track from time to time and found it in the same condition as that testified to by Church, and that they also thought the track had been abandoned and was not used for the operation of trains. Photographs taken three weeks after the accident were submitted to the jury as evidence of the same facts, they viewed the locality, and found a verdict in favor of Church, which the circuit court refused to set aside.

The issue involved lies within extremely narrow limits.

The court declined to give a number of instructions offered by the defendant company's counsel, drawn in accordance with well established precedents, to the effect that tracks of a railroad company are a proclamation of danger; that a traveler approaching a railroad crossing should look and listen for approaching trains; that he must assume that there is danger; that the mere failure to have a sign board at a crossing will not excuse the negligence of the traveler; and that if they believed that Church's negligence contributed to the injury he could not recover. In lieu thereof the court instructed the jury that Church could not recover if he knew, or ought to have known, that the track was in use and had not been abandoned, using this language:

"The court instructs the jury that if they believe from the evidence that the plaintiff knew, or in the exercise of reasonable care ought to have known, a reasonable time prior to the accident and in time to avoid it, that he was

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approaching the track of a railroad on which trains were being operated; and if you further believe he had, or ought to have had, such knowledge, and did approach and go upon said track and was struck and injured, then he was guilty of contributory negligence, and you must find for the defendant."

It is apparent, therefore, that the judge of the trial court was of opinion, as a matter of law, that Church was not entitled to recover if he knew, or should have known, that he was approaching the track of a railroad on which trains were operated, and not an abandoned track, and the instruction given was more favorable to the company than any of the fourteen instructions which were refused.

Among other instructions given by the court at the instance of Church, presenting his view to the jury, is instruction No. 3, reading as follows: "The court instructs the jury that, although they may believe from the evidence that Mr. Church may have known as a boy twelve or thirteen years of age that trains were being operated on the track of the defendant over the crossing in question, yet, if the jury believe from the evidence that from the time he was about thirteen years of age until about a year before the accident Mr. Church lived in Norfolk, and did not have any knowledge in reference to said railroad track during said interval; that during the period of about one year preceding the accident the plaintiff passed over said crossing about a dozen or fifteen times, and that at each time he crossed it during said latter period up to the time of the accident the track was covered with sand and dirt, the rails appeared to be rusty, that the road was a public highway and the tracks of the defendant crossed it at the same level, and that the railroad company did not maintain at said crossing the signal board described in Instruction No. 1, and that the conditions within his knowledge were such as to lead a reasonably prudent man to believe that trains

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were no longer run over said track, and that Mr. Church did so believe, then the jury (are) instructed that Mr. Church was not guilty of contributory negligence in going upon the track in question without looking and listening for a train or taking any precaution for his safety, unless the jury believe from the evidence that he actually heard any warning signal that may have been given in time to avoid the accident, or that he had actual knowledge of the approach of the said train, in time to have escaped it.

"As one of the elements in determining whether Mr. Church knew or ought to have known that trains were being run on said track at the time of the accident, the jury are instructed that he had the right, if he were then without knowledge such as would inform a reasonably prudent man to the contrary, to assume that the railroad company would obey the statute law of Virginia, and place a signal board such as is described in Instruction No. 1, at said crossing, if it were using said track for the operation of trains thereon, if the jury shall believe from the evidence that the road was a public highway and crossed the tracks of the defendant at the same level."

These two instructions clearly presented the controlling issue of fact to the jury, and they also present the question of law which this court must determine.

While the warning sign was not necessary to inform Church that he was approaching the crossing, because he already knew it, still its absence was most significant as confirmatory of the other indications that the track had been abandoned and that the crossing was no longer dangerous. The concealed and dirt-covered rails alone on a much-traveled dirt highway would have been insufficient to justify the assumption that the track had been abandoned; so too the small and rusty rails, with undergrowth so near the track (for these conditions are not unusual); but when the impressions created by these indications of

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abandonment were confirmed by the absence of the warning sign, which is both customary and required by the statute, it cannot be maintained as a conclusion of law that the court erred in submitting the question to the jury. Such warning sign could have been seen 300 yards distant from the crossing. Its absence may or may not have been the proximate cause of the accident. If fair-minded men might honestly differ as to this, then we cannot, without violating salutary principles of law, merely because we might differ with the conclusions of the jury, sanctioned by the trial court, invade their province to determine debatable questions of fact. *City of Norfolk* v. *Anthony,* 117 Va. 777, 86 S. E. 68.

The case is unique, and the question is not free from difficulty. Upon principle, however, it seems to us that the court properly stated the law and presented the issue of fact to be decided to the jury. That a railroad track across a highway is itself a proclamation of danger, and that travelers approaching such crossing on the highway must exercise proper precautions for their own safety, is perfectly well settled in this country. Even though the company may be guilty of negligence, the traveler cannot recover if his own neglect to take such proper precautions proximately contributed to his injury. In order to constitute such proclamation of danger, however, under this just rule of law, the company should not do, or omit to do, anything which is likely to disarm the traveler and reassure him of his safety. The reason of the law fails if the tracks in fact and beyond all question have been abandoned. If the rails were so covered with earth as not only to be invisible on the highway bed, but to convey the impression that the track was not in use by trains; if, in addition to this, the rails themselves were rusty, obscured by vegetation growing close to them; and if there was no crossing signal board;

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then these combined circumstances presented a question to be submitted to the jury to determine whether or not a prudent man exercising due care commensurate with the danger to be apprehended, in approaching such a track, would apprehend danger, or would feel assured of his safety because of the absence of the crossing sign, together with such other surrounding conditions.

Paraphrasing some of the language of Buchanan, J., in *Atlantic & Danville R. Co.* v. *Reiger*, 95 Va. 427, 28 S. E. 590, who was referring to the statute requiring the sounding of a locomotive whistle before crossing a public highway, this may be said: The defendant, as it admits, was guilty of negligence in failing to construct and maintain the proper signal board at the crossing, for the statute, sub-section 49 of section 1249-d, Pollard's Code, is mandatory and requires crossing signs to be erected and maintained. The object of the statute is to protect human life and as the injury to the plaintiff was especially such as the maintenance of the sign board was intended to prevent the presumption arises that the injury may have been caused by such neglect, unless the plaintiff's own fault is manifest. Whether this negligence was or was not the cause of the injury must be determined from all the facts and circumstances of the case. The legislature has determined that the sign board must be erected, and it is not for the court or the jury to determine that some other method is equally as good. The question which the jury had to determine was not whether knowledge conveyed by one means is as good as another, but whether or not, under all the circumstances of the case, including the fact that the sign board had not been erected in the manner required by the statute, the injury was proximately caused by the defendant's negligence alone, or by the combined negligence of both plaintiff and defendant.

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It may be an unnecessary repetition, and yet the issue raised in this case suggests a restatement of the doctrine so clearly stated by Cardwell, J., in *Norfolk* v. *Anthony*, 117 Va. 777, 86 S. E. 68, namely, that it is well settled by the Supreme Court of the United States and this court by practically an unbroken line of decisions, "that negligence only becomes a question of law to be taken from the jury when the facts are such that fairminded men can only draw one inference therefrom. If fairminded men, from the proofs submitted, may honestly differ, as to the negligence charged, the question is not one of law, but one of fact to be determined by the jury under proper instructions from the court." *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *R. & D. R. Co.* v. *Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Northern Pac. R. Co.* v. *Everett*, 152 U. S. 107, 14 Sup. Ct. 479, 38 L. Ed. 373; *McDermott* v. *Severe*, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Winchester* v. *Carroll*, 99 Va. 742, 40 S. E. 37; *Fisher* v. *C. & O. Ry. Co.*, 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954; *Cardwell* v. *N. & W. Ry. Co.*, 114 Va. 512, 77 S. E. 612; *Higgins* v. *Southern Ry. Co.*, 116 Va. 890, 83 S. E. 380.

Another question raised was the failure of the court, through inadvertence, to read an instruction to the jury, referring to the burden of proof, which the court at the instance of the defendant intended to read. The court certifies, however, that the case was argued before the jury by the opposing attorneys upon proper assumptions as to the burden of proof as stated in the instruction. While such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, still in this case there is no reason to suppose that the company was injured by the inadvertence of the judge combined with the inattention or inadvertence of the attorneys on both sides in

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failing to read or to have this instruction read to the jury, because it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof.

Upon the whole case, it appears that the material issue of fact which the record presents was properly submitted to the jury, and that this court cannot disturb the judgment without ignoring the well settled doctrines referred to.

Affirmed.

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Syllabus.

Wytheville.

ATLANTIC COAST LINE RAILROAD COMPANY v. TREDWAY'S ADMINISTRATRIX.

June 14, 1917.

Absent, Burks, J.*

1. FEDERAL EMPLOYERS' LIABILITY ACT—*Employer and Employee.*—Defendant's railroad tracks were crossed by those of the Southern Railway. In consideration of the privilege of crossing, and in accordance with section 1294-d (37), Code of 1904, the Southern Railway agreed to provide at its cost "such watchman, watch boxes, signals, approaches, and safe guards" as its manager or superintendent might deem proper and necessary. In compliance with this agreement, the Southern Railway erected at the crossing a signal tower and it assumed the duty of supplying and paying the operators in the tower and also the employees who lit the lamps required for the proper operation of the interlocking plant by night. The employees rendered certain services to defendant, among others keeping certain lights in order, which served as signals for defendant's trains only and not for those of the Southern Railway Company. Plaintiff's intestate was one of the operators of the signals and it was also his duty to keep one of the defendant's signal lights aforesaid in order; and while engaged in his duty of attending to this light was killed through the negligence of the defendant.

   Held: That plaintiff's intestate was an employee of defendant, within the meaning of that term as used in the Federal employers' liability act.

2. FEDERAL EMPLOYERS' LIABILITY ACT—*Meaning of Terms "Employed" and "Employee."*—The failure of the Congress to define the meaning of the words "employed" and "employee" manifests a purpose in the legislation in question that these words should be interpreted and understood in their ordinary sense and according to their usage in the law of master and servant. That is to say, the relationship of employer and employee is the same as that of master and servant.

*Case submitted before Judge Burks took his seat.

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Syllabus.

3. MASTER AND SERVANT—*Relationship of Master and Servant.*—At common law, upon the question of whether the relationship of master and servant exists, there are four elements which are considered: (1) Selection and engagement of the servant; (2) payment of wages; (3) power of dismissal; and (4) the power of control of the servant's action. Where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged.
4. MASTER AND SERVANT—*Relationship of Master and Servant—Non-Assignable Duties.*—Where the duties of the master are non-assignable, the power of control of the servant's action is not the ultimate fact which determines the relationship of master and servant. The ultimate facts are, was the person in question engaged in the discharge of the duties of a servant of another, and was that service accepted by that other—was such service rendered and accepted? If so, the law implies the contract of master and servant between the latter and the former—of employer and employee—and the existence of that relationship between them.
5. MASTER AND SERVANT—*Relationship of Master and Servant—Non-Assignable Duties—Carrier.*—And were the service not accepted as that of a servant, and, by express agreement or otherwise, the master were to attempt to escape responsibility by relinquishing control of the servant—where the duty is non-assignable—the master can not escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty. And the duty is non-assignable when it pertains to the operation of a completed railway of a common carrier.
6. MASTER AND SERVANT—*General and Special Master.*—A servant may be transferred from his service for one master—who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master—to the service of another person other than his general master; in which case—(1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil one of those duties which the law imposes upon masters for the benefit and protection of their servants.
7. MASTER AND SERVANT—*Non-Assignable Duties—Carriers.*—The duties of the plaintiff's intestate in tending signals and lights of defendant were non-assignable duties.

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Statement.

8. RAILROADS—*Negligence—Master and Servant—Disregarding Signal.*—Plaintiff's intestate, a signalman, after he had set a stop signal against a train, was struck and killed by such train, which disregarded the signal while he was tending another light. The stop signal was plainly visible to the engineer of the train.

Held: That defendant railroad was guilty of negligence.

Error to a judgment of the Circuit Court of Greensville county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

Wm. B. McIlwaine and *Wm. Leigh Williams,* for the plaintiff in error.

Buford & Peterson and *Southall & Turner,* for the defendant in error.

STATEMENT OF THE CASE AND FACTS, BY SIMS, J.

The plaintiff in error was the defendant in the court below, hereinafter designated "defendant." The defendant in error was the plaintiff in the court below, hereinafter designated "plaintiff."

The action was brought under the Federal employers' liability act and involves only two questions, namely:

1. Whether the plaintiff's intestate was an "employee" of the defendant, within the meaning of the Federal employers' liability act approved April 22, 1908, at the time of receiving his injuries?

2. Whether said injuries and death were due wholly or in part, to the negligence of the defendant.

The trial in the court below resulted in a verdict and judgment for the plaintiff. Considering the evidence, under

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the rule applicable in such cases, the material facts bearing on said questions are as follows:

FACTS.

1st. With respect to whether the plaintiff's intestate was an employee of the defendant at the time of receiving his injuries.

The accident occurred in the town of Emporia at a grade crossing of the railroad of the defendant over the railroad of the Southern Railway Company. Defendant's railroad, through its predecessor in title was the senior in location at this point. The Southern Railway, through its predecessor in title, constructed its line of railway across the railway of defendant at Emporia under the terms of an agreement in writing. At the time of the accident the defendant occupied the position of the party of the first part under this agreement and the Southern Railway Company the position of the party of the second part thereunder. The material provisions of such agreement are as follows:

"Second: The construction and material employed in such 'crossing' shall be acceptable to the party of the first part.

"Third: The entire expense of construction and maintenance of the 'crossing' shall be borne by the party of the second part who shall at once make good and pay over to the party of the first part, on demand of their proper officers, the full amount of any expense the party of the first part may incur now, or hereafter, in accommodating their tracks or road bed to the said 'crossing' and shall at all times promptly make such repairs of the same as may be prescribed and demanded by the proper officers of the party of the first part.

"Fifth: The party of the first part shall have the right at any time to construct across the track of the party of the

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second part within the limits of forty feet on each side of the center of and measured at right angles to the track of the party of the first part, additional tracks, and it shall be the duty of the party of the second part to provide and maintain the crossings needed therefor in the same manner and to the same extent as in the case of the crossings of the present track of said first party and on like terms and conditions.

"Sixth: It shall be the duty of the said party of the second part at their own exclusive, proper cost to provide and maintain at all times and both by day and by night such watchman, watch boxes, signals, approaches, and safe guards, as may in the opinion of the superintendent or manager of the party of the first part, be proper and necessary for the protection of the trains of the parties to this contract or of those of any party who may at any time use the track of either party and the 'crossing' herein provided for, for the passage of locomotive engines or cars, and the duties of such watchman shall be exclusively those arising out of the management of the 'crossing,' and they shall not be employed by either party for any other purpose whatsoever."

This agreement in effect made the same provisions as the statute in Virginia, section 1294-d (37), Pollard's Code 1904, on the subject, which is as follows:

"(37) Any railroad company heretofore, or that may hereafter, be incorporated, and authorized to construct a railroad within the jurisdiction of this State, shall, when such railroad is constructed to any other railroad track, or the right of way of any other railroad being operated under the laws of this State, have the right to connect with such railroad in any county of this State at its own cost, at any suitable point that may be agreed upon between the chief engineers of the two railroad companies, and if the said engineers shall fail to agree, the State Corporation Commis-

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sion may, after hearing evidence decide the question in dispute and enter the proper order. But such connection, if made, and all costs and expenses of such operation and maintenance of such connection, including signals and other things deemed necessary by the company with which said connection is made, for the proper operation and protection thereof, shall be borne and paid by the company making such connection."

Subsequently to said agreement it became necessary for the defendant to double-track its road, which was accordingly done, through Emporia, and the Southern Railway Company in accordance with its agreement bore the expense of the construction, at said crossing, of a signal tower, together with various levers and devices for signalling trains and for the operation thereof, known as an "interlocking plant," and assumed the duty of supplying and paying the operators in the tower and also the employees who lit the lamps required for the proper operation of the interlocking plant by night. (Certain automatic electric devices operating in connection with the signals aforesaid were installed in said signal tower and in connection therewith by the defendant, at its own expense; but as this circumstance is immaterial in the view we take of the case, no detailed reference need be made thereto).

The Southern Railway Company employed (in the sense of making contract of employment with), paid, and had the right to discharge the employees referred to.

By virtue of the said agreement and also of the said statute on the subject the defendant furnished to the Southern Railway Company the consideration—viz. the privilege of crossing its track—for the payment by the latter of the wages of said employees, and for its assumption of the primary administrative duties of engaging and discharging said employees.

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The employees, however, rendered certain services for the defendant in and about the signalling of its trains passing to and fro over said crossing, as well as like services for the Southern Railway Company in and about the signalling of its trains passing to and fro over such crossing. For example, and in particular, as bearing on the instant case, such employees served the defendant in answering the signals of its trains, and in turn responding to such signals by themselves giving signals permitting or forbidding the passage of defendant's trains, and also served the defendant in the keeping of certain lights in order, which served as signals for defendant's trains only and not for those of the Southern Railway Company.

Among the lights last above named was dwarf signal light No. 4, located on the defendant's right of way, close beside its track south of the signal tower and crossing. This dwarf light No. 4 was not used for signalling any of the Southern Railway Company trains, but solely for signalling the trains running on defendant's road.

The plaintiff's intestate was one of the operators of the signals from the aforesaid signal tower and it was also his duty to keep the dwarf signal light No. 4 in order. He was in effect employed (in the sense of contracted with) and paid, by the Southern Railway Company. (There were certain details as to how he came to undertake the duty of keeping said dwarf signal light No. 4 in order, which are immaterial, and hence need not be set out here.) The Southern Railway Company also had the authority to discharge the plaintiff's intestate.

2. With respect to whether the injuries and death of the plaintiff's intestate were due, wholly or in part, to the negligence of the defendant, the facts were as follows:

There was a high signal post by the side of the defendant's railway, 442 feet to the north of the center of the signal tower, operated therefrom, on which there was dis-

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played for some time and immediately before the accident, a stop signal consisting of a red light and a paddle in a horizontal position, by and in disregard of which, and the rules of the company, and of the defendant's duty in that behalf, the south-bound passenger train of defendant ran, which struck and killed the plaintiff's intestate while engaged in his duty of tending said dwarf light No. 4 (fixing, preparatory to relighting it) after he had, as signal operator in the tower, left the stop signal set as aforesaid against the passage of such southbound train and had the right to rely upon it not passing where he was until he had returned to the signal tower and changed said stop signal to one allowing the passage of the train. This occurred about 8:18 or 8:17 P. M. on the 13th day of August, 1915.

The headlight of the engine of the said train going south made the position of the paddle at the signal post aforesaid plainly visible to the engineer of such train. The red light was also plainly visible at the hour named to such engineer.

The light of the stop signal aforesaid, whether red or white, could not be seen from the signal tower, as it was not constructed or intended, when set as it was, to shine in that direction, but the testimony for plaintiff, with regard to the stop signal being set as aforesaid against said southbound train, was definite and positive, and consisted of the statement of an eyewitness as to what was the action of the plaintiff's intestate and his statements *dum fervet opus*, in connection with such action, in the signal tower immediately preceding the leaving the tower by the latter to go to fix the dwarf light No. 4. It is true there was testimony for defendant (four witnesses) in direct conflict on this point with the one witness for the plaintiff and there was some inaccuracy in the testimony of plaintiff's witness with respect to the number of one of the levers in the signal tower; but all this went merely to the accuracy and credibility of this witness and was for the jury. We cannot

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enter upon that inquiry and the fact must be taken by us to be that the red signal—the stop signal—was set as aforesaid.

The agreement in the evidence was abrogated at a date subsequent to the accident aforesaid, and the defendant is now exercising the right of direct employment, supervision and control of the employees discharging the duties formerly discharged by plaintiff's intestate.

THE ASSIGNMENTS OF ERROR.

There are two assignments of error: First, with respect to the giving, refusing and modifying of certain instructions by the court below; and, secondly, to the action of such court in refusing to set aside the verdict of the jury on the motion of the defendant and grant it a new trial. (The ground assigned in the petition with respect to the verdict being excessive was not pressed in the argument and is untenable under the well settled rules on the subject.)

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

As indicated above, the assignments of error raise only two questions for our determination, which will be considered in their order as stated below:

1. Was the plaintiff's intestate an "employee" of the defendant, or in its employment, within the meaning of the Federal employers' liability act approved April 22, 1908, at the time of receiving his injuries?

The Federal act in question does not itself define the meaning of the word "employee" or the word "employed" also used in the act.

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That portion of such act, which is pertinent to the question under consideration, is as follows:

* * * "every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * or in case of the death of such employee, to his * * * personal representative."

The learning and exhaustive search of able counsel on both sides of this case have not resulted in citing us to any decision or discussion by any text-writer of the meaning of these terms as employed in such act. The precise question before us seems, therefore, to be a novel one both in our Federal and State courts.

The word "employed," and more especially the word "employee," considered apart from their context in the Federal act, are ambiguous in their meaning. They may be limited in meaning by the idea that an express contract of hiring by the carrier of and the payment of wages by the latter to the employee, are essential to bring him within the provisions of the act. Or they may have a broader meaning and include as employees all who are engaged in the discharge of duties of servants of the carrier, whose service is knowingly accepted by the latter.

On a collateral question it has been held that, the failure of the Congress to define the meaning of the words referred to above manifests a purpose in the legislation in question that these words should be interpreted and understood in their ordinary sense and according to their usage in the law of master and servant. *Louisville etc., Co.* v. *Walker* (1915), 162 Ky. 209, 172 S. W. 517.

That is to say, the relationship of employer and employee is the same as that of master and servant.

In the law of master and servant the principles of the common law determining when this relationship exists, are well settled. At common law, upon the question of whether

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the relationship of master and servant exists, there are four elements which are considered: (1) selection and engagement of the servant; (2) payment of wages; (3) power of dismissal; and (4) the power of control of the servant's action. Roberts & Wallace, Employers' Liability (4th ed.), p. 78.

But, as the last cited author says, the first, second and third of these elements are not essential to the relationship (*Idem*, p. 79-82). The "power of control" is the most significant element bearing on the question, in the opinion of this author, gathered by him from the authorities. (*Idem*, p. 85, 88, 87. See also note 37 L. R. A., pp. 38-43). As said in the case of *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 53 L. Ed. 480, 29 S. Ct. 252, "In many of the cases the power of substitution or discharge, the payment of wages, and the circumstances bearing upon the relation, are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and where is the power of control." Many of the authorities emphasize the importance of locating in what person resides the power of control, as a test for ascertaining whether one occupies the relationship of master to another. See English and American authorities collated in note to 37 L. R. A. pp. 38-39; *Tompkins* v. *Pacific Mut. Life Ins. Co.*, 53 W. Va. 479-492, 44 S. E. 439; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518-523, 33 L. Ed. 440, 10 Sup. Ct. 175. Some of these authorities are to the effect that control of the manner in which the details of the work are to be done is the test; but this is not a dependable test. *Standard Oil Co.* v. *Anderson, supra.* The control over the work of the servant may be divided. The master may, for reasons of his own, delegate the immediate direction and control of his servant to another and still reserve the ultimate power of control. (*Standard Oil Co.* v. *Anderson, supra.*) Whether the ultimate power of control is express,

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or is in one form or in another, is manifestly immaterial. But, after all, such questions concern only the fact of control. Is this the ultimate fact to be sought in our inquiry? Manifestly not, where the duties of the servant are non-assignable. If the master could escape liability for the torts of his servants, or for negligent injuries to them, by surrendering his power of control over them, in a qualified way (as was done by the agreement in evidence in the instant case), or by entirely surrendering such control, he might do so. Yet, plainly, in the case of non-assignable duties, the inquiry would still remain, in every case of tort or injury aforesaid, did the relationship of master and servant in fact exist? If so, the duties imposed by law upon the master as the result of that relationship would remain, independent of the fact in whom the immediate or ultimate power of control of the servant might reside.

The defendant had the power of control in question originally. It need not have parted with it. If by the agreement in evidence it did part with it, partly or wholly, it could not thereby divest itself of the legal responsibility it was under to exercise such control. It is indeed illogical and unsound in principle to make the possession of the power of control of a servant the test in the ascertainment of who is the master of such servant, in cases where the duties of the latter are non-assignable. In truth it follows rather from the relationship of master and servant—from the mutual duties and obligations which the law imposes as the result of such relationship—that the master has the right of control of the servant, than does the relationship follow from the existence of the power of control. The latter may, indeed, and does in fact almost invariably accompany the former; but it accomplishes it as an effect and not as a cause. Again, it may not invariably accompany the relationship, as we have seen. This consideration alone, con-

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demns it as a test of the existence of the relationship in question.

Therefore, while we have not found it elsewhere so expressed in terms, the authorities on the subject have developed and led us to the necessary conclusion, where the duties of the master are non-assignable, that control is not the ultimate fact for which we are in search. The ultimate facts are, was the person in question engaged in the discharge of the duties of a servant of another, and was that service accepted by that other—was such service rendered and accepted? If so, the law implies the contract of master and servant between the latter and the former—of employer and employee—and the existence of that relationship between them. We are aware that many authorities give no weight to the rendition of the service and predicate the conclusion that one is or is not the master upon the four elements above referred to being present or absent in the conduct of the latter. The effect which a knowing acceptance of the service must have, in principle, is often overlooked.

Further: Were the service not accepted as that of a servant, and, by express agreement or otherwise, the master were to attempt to escape responsibility by relinquishing control of the servant—where the duty is non-assignable—the master cannot escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty. (*Lucas* v. *Mason,* L. R. 10 Ex. 251-3; *Hardaker* v. *Idle District Counil* [1896], 1 Q. B. at p. 340, per Lindley L. J.; *Dalton* v. *Angus,* 6 App. Cas. at p. 829.) And the duty is non-assignable when it pertains to the operation of a completed railway of a common carrier. (See authorities collated in note to 66 L. R. A. pp. 140-2; *Boucher* v. *New York etc. R. Co.,* 196 Mass. 355, 82 N. E. 15, 13 L. R. A. [N. S.] 1177 and authorities cited in note.)

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So in the instant case, the duties of the plaintiff's intestate, (among others) were to operate signals connected with the passage of the trains of defendant and to keep a certain light, which served exclusively the operation of certain of defendant's trains. They were in their very nature duties necessarily to be performed by some one for the defendant, to enable the latter to discharge its public service duties as a common carrier—its public employment under its franchise. *Central &c. Co.* v. *Pullman Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. 478, and authorities next above cited. They were therefore duties of the defendant and not of the Southern Railway Company, or of any other person or corporation. Their discharge was the discharge of duties of a servant to the defendant. That service by the plaintiff's intestate was knowingly accepted by the defendant. Hence, upon the established principles of the common law, the plaintiff's intestate was a servant—an employee—of the defendant.

If it were thought that ultimate power of control—and, indeed, the selection and engagement of the plaintiff's intestate, the power of dismissal and the payment of his wages, were essential to his relationship to the defendant being that of an employee—all of these elements will be found, on consideration, present and possessed by the defendant in the instant case.

With respect to the ultimate power of control—that was possessed by the defendant through the Southern Railway Company. If the latter had supplied an inefficient servant for the discharge of the duties of the plaintiff's intestate and had refused to discharge him, it would have been a breach of contract for which the law would have afforded ample remedy to enable the defendant to accomplish the discharge of such a servant and the engagement of a competent servant in his stead. Indeed counsel for defendant, in the trial of the case in the court below, very properly and

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correctly stated, in effect, that in case there should be a breach of its duty by the Southern Railway Company to the defendant in the matter of supplying the former with efficient servants in and about the signal tower, the defendant "would find a way" to control the matter. No absolute right of control of the employees contemplated thereby was vested in the Southern Railway Company by the agreement in evidence, or by the Virginia statute on the subject. *Quoad* the service to be rendered by the employees for the defendant, the agreement imposed the undertaking of the immediate control upon the Southern Railway Company for the benefit of the defendant. The former was merely the agent of the latter in performing such undertaking, both under said agreement and under the Virginia statute. There was nothing in the Virginia statute which forbade or prevented the defendant from exercising such control directly —as indeed the defendant is now doing, the agreement in evidence having been abrogated since the case at bar arose. There is nothing in section 1294-b, clause 3 (Pollard's Code of Va. 1904), referred to in reply brief for the defendant inconsistent with the foregoing conclusions. From this it is manifest that while said agreement was in force the Southern Railway Company was merely the agent of the defendant under such agreement to exercise the immediate control of the plaintiff's intestate, with the ultimate power of control remaining vested in the defendant. *Qui facit per alium, facit per se.*

With respect to the selection and engagement of the plaintiff's intestate and the power of dismissal, what is said in the next preceding paragraphs above holds true.

As was said by that eminent judge, Chief Justice Shaw, in the case of *Sproul* v. *Hemmingway*, 14 Pick. (Mass.) 1, 25 Am. Dec. 350, one of the grounds on which persons are held to be employees of owners of "a vessel or coach" is, "in respect to their being engaged in the business or em-

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ployment of the owners, conducting and carrying on such business for the profit or pleasure of the owners, by reason of which the acts done in the prosecution of such business shall be taken *civiliter* to be done by the employers themselves, and this whether the persons whose negligence is the cause of damage have been retained and employed by the principal himself, or *by the procuration of others, employed by him for the purpose.*" (Italics supplied.)

And in *Quarman* v. *Barnett,* 6 M. & W. 409, in the opinion of Baron Parke, confirming the opinions of Lord Tenterdon and Littledale, J., it is said:

"Upon the principle *qui facit per alium, facit per se,* the master is responsible for the acts of the servant, and that person is undoubtedly liable who stood in the relation of master to the wrong-doer—he who has selected him as his servant, from the knowledge or belief in his skill and care—and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or *intermediately, through the intervention of an agent authorized by him to appoint servants for him,* can make no difference." (Italics supplied.) See also Thomp. Neg., sec. 39.

With respect to the payment of wages, they were in effect paid by defendant through its predecessor in title, when the latter furnished the consideration of permitting the crossing, for which the agreement in evidence, and the Virginia statute in such case made and provided, bound the Southern Railway to pay such wages.

Hence we have present as the instant case all four of the elements above referred to which are considered upon the question of whether the relationship of master and servant exists. It is agreed by all of the authorities that "where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged." (Roberts & Wallace, Employers' Liability [4th ed.] p. 78.)

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The following additional references to the authorities will further develop the distinction above taken.

A servant may be transferred from his service for one master—who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master—to the service of another person other than his general master; in which case—

"(1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil one of those duties which the law imposes upon masters for the benefit and protection of their servants." 1 Labatt on Master and Servant (2nd ed.), sec. 52, p. 170. See for same principle *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205.

In *Missouri Pac. R. Co.* v. *Jones*, 75 Tex. 151, 12 S. W. 972, the following is said in the opinion of the court:

"Upon this branch of the case the facts were that appellee (plaintiff) was at the time of and several months prior to the injury at work for appellant in its yards at Fort Worth, Texas. He was employed by Phalling, the yard master, and received his pay from the Texas Pacific Railway Company. Appellee's duties were to stay in the yard and make up trains. The track on which the injury occurred was kept in repair by appellant. The appellant had control of the yard. It had the track on which appellee was injured dug out between the ties about a day before appellee was hurt; holes were opened out above where he was injured, and there were no ties to put in them. The road master was informed of the danger, but the track was left in that condition.

"The facts show that the appellee was the general ser-

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vant of the Texas Pacific and the special servant of the appellant. He performed special services for the latter while the general servant of the former, and while so performing this special service he was the servant of appellee at the time.

"There was no proof of an express contract showing the relation of master and servant between appellant and appellee, but the evidence of the service performed by Jones for the Missouri Pacific and the connection between the two companies authorized the inference that this relation did exist.

"In the case of *Railway Co.* v. *Dorsey*, cited in *Gulf* v. *Dorsey*, 66 Texas 148, 152, 18 S. W. 444, the plaintiff was employed to serve the several companies in their respective yards. It was held that he was the servant of the one in which yard he was when at work. In the opinion in that case it is said:

" 'The proof, we think, shows that by virtue of some arrangement, the precise nature of which could not be ascertained, between the Texas Pacific and the Missouri Pacific Companies, it was the duty of the appellee, who received his pay from the former company, to switch and couple and uncouple the cars in the yard of the appellant and on its tracks, over which the appellant had exclusive control, and whose duty it was to keep said track in repair; and that at the time of performing these services for the Missouri Pacific he was injured by reason of its negligence. While engaged in this service for appellant, *with its knowledge* and under its agreement that the appellee should perform such service, he was the servant of the appellant. The inference was authorized that appellant paid the Texas Pacific for his services, which would be tantamount to a payment to him. *The payment* we believe to be *immaterial* under the facts of this case. He had for a long time prior to the injury *worked for the appellant*, and *his labor was accepted*

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up to the time of the injury. *Those facts* made appellee *the servant of appellant* in the transaction in which the damage was sustained *by reason of the service performed.'* " (Italics supplied.)

In *Central* v. *Texas,* 32 Fed. 448, it is held that one who assisted a yard master in making up a train was a servant of the receivers operating the road, whether or not the road master directed him to assist in the capacity of a servant or he volunteered to do so—he was held to have *rendered a service* to the receivers *with the acquiescence of their agent*—i. e. his services were *rendered* to them and *knowingly accepted* by the receivers through their agent, and he was entitled to the protection to be accorded a servant from injury due to the receivers' negligence. (Italics supplied.)

See, to same effect, *Thyssen* v. *Davenport Co.,* 134 Iowa, 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572 and note.

In *Floody* v. *Railroad Co.,* 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. (N. S.) 1196, it was held that a railroad company is liable to its servants for the negligence of the employees of a union depot company, whose duty it is to operate the switches and direct the movement of the trains out of the depot yards. "For the occasion the servants of the depot company become the servants of the railroad company."

The court in its opinion said:

"It was *immaterial* to plaintiff that the switchmen were *paid* by the Union Depot Company, and were *under its control* in operating the switches, if for the occasion, the Omaha Company" (the defendant) *"chose to avail itself* of *the services* of that company and its employees for the purpose of taking its train out of the depot." Citing *Wabash &c. R. Co.* v. *Peyton,* 106 Ill. 534, 46 Am. Rep. 705, which is to the same effect. (Italics supplied.)

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In *McElroy* v. *Nashua etc. R. Corp.*, 4 Cush. (Mass.) 400, 50 Am. Dec. 794, there was a connection by the defendant railroad, with another railroad, under statute. The injury was occasioned by the negligent operation of a switch on defendant's railroad, making such connection, by a servant of the other railroad. The switch itself was also provided by the latter. The defendant was held liable for the negligence of the servant whose duty it was to operate the switches—*i. e.*, the latter was held to be *pro haec vice* the servant of the defendant. Chief Justice Shaw in delivering the opinion of the court said:

"The switch in question in the careless or negligent management of which the damage occurred, was part of the defendant's road * * *; and although provided for and attended by a servant of the Concord Railroad Corporation, and *at their expense*, yet it was still a part of the Nashua and Lowell railroad" (the defendant) "and *it was within the scope of their duty*" (the defendant's) "to see that the switch was rightly constructed, attended and managed" * * * (Italics supplied.)

But counsel for the defendant contend that in the instant case the duties of the plaintiff's intestate were assignable duties and that the Southern Railway Company was an independent contractor with respect to such duties, and, hence, the plaintiff's intestate was its employee, and not the employee of defendant. Upon this inquiry, if the duties in question were assignable, the ascertainment of the possessor of *the control* over the work and the servant, would be decisive as to who was the employer of the servant. As was said by Willis, J., in *Murray* v. *Currie*, 2 C. P. D. 369, with regard to cases where the duty is assignable: "In ascertaining who is liable for the act of a wrong-doer, you must look to the wrong-doer himself, or to the first person in the ascending line who is the employer and has the control over

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the work. You cannot go further and make the employer of that person liable. It is upon this principle that the cases rest of *Bibb* v. *N. & W. Ry. Co.*, 87 Va. 711-740, 14 S. E. 163; *Emmerson* v. *Fay*, 94 Va. 60, 26 S. E. 386; *N. & W. Ry. Co.* v. *Stevens*, 97 Va. 631, 34 S. E. 525; *Railroad Co.* v. *Hanning*, 15 Wall. (U. S.) 649-658; *Casement* v. *Brown*, 148 U. S. 615-622, 37 L. Ed. 582, 13 Sup. Ct. 672; and *Chicago, &c. Ry. Co.* v. *Bond*, 240 U. S. 449, 60 L. Ed. p. 735, 36 Sup. Ct. 403, cited and relied on for defendant. They are inapplicable to the instant case for the reason that the duties of the servant in question were of such a character, as above noted, that they could not be assigned by the defendant to an independent contractor so as to release itself from the position of responsibility for their proper discharge. That is to say, the defendant could not abdicate its position of master with regard to the plaintiff's intestate in the instant case, by delegating or assigning its duty of control of such servant to any independent contractor. It is not a case in which the doctrine of independent contractor is applicable. (See authorities collated in note to 66 L. R. A. pp. 119, 136-7, 140-2; *Boucher* v. *New York, &c. R. Co.*, *supra*, 13 L. R. A. (N. S.) 1177 and authorities collated in note thereto.

We conclude therefore that the plaintiff's intestate was an employee of the defendant within the meaning of the said Federal employers' liability act at the time of receiving his injuries.

With respect to the only question remaining for our consideration, namely:

2. Were the injuries and death of the plaintiff's intestate due, wholly or in part, to the negligence of the defendant?

We do not deem it necessary on this question to enter into any detailed discussion of the evidence or reference to the authorities. The result of the evidence when considered

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as if on demurrer thereto by the defendant, as we must consider it, is stated above. The authorities on this subject are too well understood to need citation. We can come to no other conclusion from the evidence and the authorities than that the inquiry under consideration must be resolved by us in the affirmative.

For the foregoing reasons we find no error in the judgment complained of and it will be affirmed.

Affirmed.

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Syllabus.

Wytheville.

THE BRENARD MANUFACTURING COMPANY v. BROWN.

June 14, 1917.

Absent, Burks, J.*

1. CONTRACTS—*Failure of Consideration—Misrepresentation.*—Defendant purchased from plaintiff under a written contract a copyrighted advertising plan and certain goods and supplies to be used in connection therewith, giving his notes in payment therefor. Plaintiff gave his bond to secure a refund to defendant, if defendant's sales were not increased in the following year to a certain fixed sum. But this agreement for a refund in case defendant's sales were not increased to the named sum were based on a representation of defendant as to sales the past year, which was admittedly false.

   Held: That in an action on the notes there was no merit in the defense and that defendant's sales did not reach the sum named in the contract.

2. CONTRACTS—*Failure of Consideration—General Issue.*—It was urged by defendant that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure of consideration.

   Held: That this defense, if sound, could be availed of under the general issue; but that to adopt this contention would be to make a new contract for the parties. There was no evidence of any agreement to increase the defendant's sales, except as set forth above; and the defendant could not prevent the collection of his notes by setting up the plaintiff's failure to comply with a stipulation which was induced by his own misrepresentation of a material fact.

3. CONTRACTS—*Sales of Advertising Scheme—Consideration for Notes.*—There was ample consideration for the notes. Although the scheme contemplated giving away the articles of merchandise as premiums or prizes, yet these articles and the

*Case submitted before Judge Burks took his seat.

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services furnished by the plaintiff in connection with the advertising scheme, represented property and value.

4. SALE OF ADVERTISING SCHEME—*Sale to Competitor.*—Where there was no provision in the contract against sales to competitors of the defendant, the fact that plaintiff had sold the same scheme to a competitor of defendant was no defense against his action, although the buyer testified that he understood from the seller's salesman that no similar scheme would be placed with any other merchant near him.

5. APPEAL AND ERROR—*Record.*—Although counsel for the defendant suggested in his brief and in the oral argument that the record before the court was inadequately and imperfectly made up and was not just to the defendant, it is obvious that the court must dispose of the case on the record as it came before it.

Error to a judgment of the Circuit Court of Sussex county, in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Reversed.

The opinion states the case.

M. G. Mason and *E. A. Kennedy*, for the plaintiff in error.

J. N. Sebrell, Jr., for the defendant in error.

KELLY, J., delivered the opinion of the court.

The Brenard Manufacturing Company brought this action of assumpsit upon four promissory notes for $100.00 each, executed to it by the defendant, C. M. Brown. Neither party demanded a jury, and all matters of law and fact having been submitted to the court for decision, there was a judgment for the defendant, and the plaintiff brings this writ of error.

The notes sued on, along with two others of like amount which were paid before the suit was brought, were given in settlement of the purchase price of a copyrighted advertising plan and certain goods and supplies to be used in

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connection therewith, the outfit consisting of printed instructions and advertising matter, watches, silverware, a toilet set and a player piano. The order for the purchase of this plan and equipment was solicited and obtained from the defendant by a salesman, but required the approval of the plaintiff at its home office, and, so far as pertinent here, was as follows:

"Brenard Mfg. Co. Gentlemen: On your approval of this order, deliver to me at your earliest convenience, F. O. B. factory or distributing point, the Claxton Player Piano, Watches, Silverware and Advertising Matter described on this and reverse side, in payment for which I herewith hand you my six notes, payable to your order, aggregating $600.00. If order is not approved and shipped by you the notes are to be cancelled and returned to me.

"My last twelve months sales were $21,000.00, and upon this figure my next twelve months sales to be $26,000.00 and that if 2 1-3 per cent. of my gross sales does not amount to six hundred dollars ($600.00) for the next twelve months you will pay me the deficiency in cash, and send your bond for $600.00 to cover this agreement with me. You are to conduct all of the correspondence in securing club leaders and members in conducting the Club Extension Campaign."

This order was accepted, the outfit was shipped and received by the defendant, and the bond mentioned in the order was executed and forwarded to the defendant in the following form:

"Know All Men by these Presents, That Brenard Mfg. Company, the Vendors as principal are held and firmly bound unto C. M. Brown in the Penal Sum of Six Hundred Dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and personal representatives.

"That conditions of the above obligation are set forth in a written order, which agrees to a cash refund on a basis of 2 1-3 per cent. if business is not increased to $26,000.00.

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"Now, therefore, if said vendor shall well and truly perform all obligations set forth in said written order, then this obligation to be void, otherwise to be and remain in full force and effect."

The defendant pleaded non-assumpsit and a special plea in writing. The special plea set up the fact that the defendant's sales for the twelve months next after the purchase from the plaintiff, instead of amounting to the sum of $26,000.00, amounted only to the sum of $8,815.00, and sought to offset against the plaintiff's demand the penalty of the bond. The defendant's representation in the original order that his sales for the previous twelve months amounted to $21,000.00 was, however, admittedly untrue, his sales for that year, in fact, having been only $13,518.00, and it was very properly conceded in this court that there was no merit in the defense set up in the special plea.

The defense urged upon us is one which, if sound, could be availed of under the general issue, and is based upon the theory that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure of consideration.

To adopt this contention would be to make a new contract for the parties. Undoubtedly, the purpose of the advertising plan was to increase sales of merchants who used it, but we are unable to say that the plaintiff would have been willing to guarantee an increase of the sales of the defendant to any extent if it had known that his sales for the previous year had been only a little over half of the amount as represented by him. There is no evidence of any agreement to increase the defendant's sales, except as set forth in the letter and bond quoted above; and the de-

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fendant, of course, may not prevent the collection of his notes by setting up the plaintiff's failure to comply with a stipulation which was induced by his own misrepresentation of a material fact. This proposition needs no citation of authority for its support, and is not controverted here.

There was ample consideration for the notes. The plan and equipment belonged to the plaintiff. The undisputed testimony offered by the plaintiff is that for this plan and equipment and the services rendered by the plaintiff in connection with it, the sum of $600.00 was a reasonable price. It is true that the scheme seems to have contemplated giving away the articles of merchandise as premiums or prizes, but it must be remembered that these articles and the services furnished by the plaintiff in connection with the advertising scheme, represented property and value, and that the plaintiff had the right to determine to whom and upon what terms it would furnish them.

But it is said that the plaintiff did not comply with the contract on its part because it sold similar propositions to the defendant's competitors. There is no provision in the contract against sales to competitors of the defendant; and the only support for the contention here made is found in a very meagre statement of the defendant to the effect "that he thought the plaintiffs treated him unfairly by selling a similar advertising proposition and supplies to Mr. J. M. Tyus at Stony Creek, about ten miles from Jarretts; that he understood from the salesman of the plaintiffs that no other similar advertising scheme would be placed with any other merchant anywhere near him, that is to say within a radius of ten (10) miles; that the plaintiffs had placed one at every cross roads store." This is the whole of the testimony upon this point, and it falls very far short of furnishing any satisfactory basis upon which to relieve the defendant from the payment of the notes.

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It was suggested in the brief and in the oral argument of counsel for the defendant (who did not appear in the lower court) that the record before this court was inadequately and imperfectly made up and was not just to the defendant. Whether this be true or not, we, of course, are unable to say, and obviously we must dispose of the case on the record as it comes to us.

Giving full effect to the rule under which we must regard the evidence in this court, the plaintiff is entitled to a judgment for the amount sued for, and this court will reverse the judgment complained of and enter the order here which should have been entered for the plaintiff in the court below.

Reversed.

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Syllabus.

Wytheville.

BROWN v. THOMAS.

June 14, 1917.

Absent, Burks, J.

1. BILLS AND NOTES—*Filling Blanks—Rule at Common Law.*—The rule at common law was that, if, at the time an incomplete instrument was negotiated to a holder for value, the latter was without notice of any limitation upon the authority to complete the instrument, other than was given by the incomplete instrument itself, the person who signed the incomplete instrument, either as maker or indorser, and delivered it, in order that it might be converted into a negotiable instrument, was not allowed thereafter to defend an action against him on the instrument, upon the ground that the blanks were not filled up in accordance with the authority he may have given to the person into whose hands he delivered the incomplete instrument. That is to say, in such case, the authority in any holder for value of such an instrument, to complete it, was absolute.
2. BILLS AND NOTES—*Filling Blanks—Authority to Fill Prima Facie or Absolute.*—At common law before an incomplete instrument was negotiated to a holder for value—before the consideration for the note passed—the authority to complete it was *prima facie* only. But after this occurrence in its history, the authority to complete the note became, at common law, absolute. The statute in Virginia (negotiable instruments law, subsection 14, section 2841-a, Code 1904) makes the authority under consideration *prima facie* only, after, as well as before, the occurrence next above referred to. It allows, at the trial, in a case such as first above stated, the defense that the blanks were not filled up in accordance with the authority given to the person into whose hands the incomplete instrument was delivered. This was a very important change in the common law on this subject and very far-reaching in its effect.
3. BILLS AND NOTES—*Filling Blanks—Authority to Fill—Case at Bar.*—In the instant case, the defendant—the person who signed and delivered the incomplete instrument, in order that

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it might be converted into a negotiable instrument—introduced no evidence, nor was there any in the case, to rebut the *prima facie* authority of the plaintiff, the holder for value, to complete the instrument given by the statute. Hence in the instant case, such authority is the same in effect as if it had been absolute, as at common law.

4. BILLS AND NOTES—*Filling Blanks—Time Within Which Blanks Must Be Filled.*—Both at common law and by virtue of the express provisions of the statute in Virginia, the blanks in an incomplete negotiable instrument must be filled within a reasonable time in order to hold the maker or endorser.

5. BILLS AND NOTES—*Filling Blanks—Reasonable Time—Questions of Law and Fact.*—What is a reasonable time in such a case is usually a question for the jury, when the facts are doubtful or disputed. But when the facts are clearly established, or undisputed, or admitted, the reasonable time is a question of law. The demurrer to evidence in the instant case avoids any controversy as to the facts. When the facts thus ascertained are such that reasonable minds could draw but one conclusion therefrom, it is for the court to draw that conclusion as a matter of law.

6. BILLS AND NOTES—*Filling Blanks—Reasonable Time—Case at Bar.*—A blank note was endorsed by defendant and delivered to his brother, who signed it and delivered to the plaintiff to secure the payment of any notes that plaintiff might subsequently endorse for defendant's brother. Upon the day after the death of the defendant's brother, insolvent, the plaintiff filled up the blanks and completed the note. As it was not until the brother's death that it could be determined that plaintiff might not be asked by him and consent to endorse other notes for him, the note could not have been completed before the brother's death, and have accomplished the purpose for which it was delivered to the plaintiff. It is clear, therefore, that in the instant case, the note was completed within a reasonable time.

Error to a judgment of the Circuit Court of Culpeper county, in an action of debt. Judgment for the defendant. Plaintiff assigns error.

Reversed.

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STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is an action of debt on a negotiable note.

The plaintiff in error was the plaintiff in the court below and the defendant in error was the defendant in the court below. They will be hereinafter referred to as plaintiff and defendant.

There was a demurrer to evidence by the defendant in the trial court; a verdict of a jury in favor of the defendant, subject to such demurrer; and, upon such demurrer, a judgment of the court in favor of the defendant in accordance with the verdict of the jury.

Considering the evidence under the rule applicable in such cases the material facts are as follows:

FACTS.

The defendant, on or about October 10, 1913, endorsed his name on the back of a printed form of the negotiable note sued on, the face of the note being then in blank, except the printed matter thereon—that is to say, the provisions of the note as to the date, amount, to whom and when payable, were left blank by the defendant. Having signed his name on the back of such incomplete instrument the defendant on or about said date, October 10, 1913, delivered it to his brother, W. A. Thomas. W. A. Thomas signed the note as maker and on October 10, 1913, delivered it to the plaintiff to be held by the latter as collateral security to indemnify and save him harmless against loss by reason of his endorsing a certain note of W. A. Thomas for $215.97 upon which W. A. Thomas then wished to borrow money by discounting it in bank, and also to indemnify and save harmless the plaintiff against loss by reason of his thereafter endorsing any other note or notes of W. A. Thomas upon which the last named might borrow money

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in bank. In consideration of such delivery to him of such note, the plaintiff on October 10, 1913, endorsed the said note of W. A. Thomas for $215.97, upon which the latter borrowed money in bank. From time to time the last named note was renewed in bank for its principal amount, the plaintiff continuing to endorse the renewals. On July 10, 1915, the plaintiff endorsed an additional note of W. A. Thomas for $95.00 at 60 days, upon which the latter borrowed further money in bank. On August 28, 1915, W. A. Thomas died insolvent. His two notes aforesaid then in bank, bearing the endorsement of the plaintiff, amounted to $320.62. Thereupon, the plaintiff, on August 29, 1915, considering the loss "to have come to him on account of his endorsement of said notes of W. A. Thomas," filled up said note sued on with the amount of $320.26, the plaintiff's name as payee, and "on demand" as to time of payment. The date "Oct. 10, 1913," had already been filled up by the plaintiff. The latter was inserted by the plaintiff when the note sued on was delivered to him as aforesaid.

The plaintiff testified that neither at the time he took the note sued on nor thereafter did he know anything of any arrangement or understanding between the defendant and W. A. Thomas placing any limitation upon the authority to complete the instrument and that he, the plaintiff, endorsed the said notes of W. A. Thomas aforesaid on which the latter borrowed money in bank and on which the plaintiff was bound, and which he would have to pay, upon the faith and credit of the note sued on, endorsed by defendant and delivered to the plaintiff as aforesaid; and that he would not have endorsed the said notes of W. A. Thomas unless the note sued on had been delivered to him as collateral security.

The statute in Virginia on the subject is contained in

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the negotiable instrument law, sub-section 14, sec. 2841-a, Pollard's Code 1904, and is as follows:

"Where the instrument is wanting in any material particular the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Hiden & Bickers, for the plaintiff in error.

Grimsley & Miller, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

Upon the assignment of error in this case only two questions are presented for our determination, namely:

1. Did the plaintiff have the authority to complete the note sued on by filling up the blanks therein as he did?

2. Were the blanks in the note sued on filled up "within a reasonable time"?

The rule at common law was that, if, at the time an incomplete instrument was negotiated to a holder for value, the latter was without notice of any limitation upon the authority to complete the instrument, other than was given

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by the incomplete instrument itself, the person who signed the incomplete instrument, either as maker or indorser, and delivered it, in order that it might be converted into a negotiable instrument, was not allowed thereafter to defend an action against him on the instrument, upon the ground that the blanks were not filled up in accordance with the authority he may have given to the person into whose hands he delivered the incomplete instrument. That is to say, in such case, the authority in any holder for value of such an instrument, to complete it, was *absolute*—could not be rebutted by proof for defendant on the trial that the instrument was not filled up strictly in accordance with such authority as the defendant may have given on the subject *dehors* the instrument itself and unknown to the holder for value at the time he negotiated the instrument. *Russell* v. *Langstaff*, (Opinion by Lord Mansfield), 2 Douglas 514; *Violett* v. *Patton*, (Opinion by Chief Justice Marshall), 5 Cranch (U. S.) 142, 3 L. Ed. 61; *Chestnut* v. *Chestnut*, 164 Va. 541, 52 S. E. 348, 2 L. R. A. (N. S.) 879, 7 Ann. Cas. 802; *Frank* v. *Lilienfeld, &c.*, 33 Grat. (74 Va.) 377-83; *Orrick* v. *Colston*, 7 Grat. (48 Va.) 189; *Jordan* v. *Neilson*, 2 Wash. (Va.) 164; *Douglas* v. *Scott & Foy*, 8 Leigh (35 Va.) 43; *Boyd* v. *McCann*, 10 Md. 118; *Eliott* v. *Chestnut*, 30 Md. 562; *Redlich* v. *Doll*, 54 N. Y. 234, 13 Am. Rep. 573; 1 Daniel on Neg. Inst. (2nd ed.), pp. 121-2.

It is true that at common law before an incomplete instrument was negotiated to a holder for value—before the consideration for the note passed—the authority to complete it was *prima facie* only. But *after* this occurrence in its history, the authority to complete the note became, at common law, absolute.

The statute in Virginia, (above quoted) makes the authority under consideration *prima facie* only, *after, as well as before,* the occurrence next above referred to. It allows, at the trial, in a case such as first above stated, the defense that the blanks were not filled up in accordance

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with the authority given to the person into whose hands the incomplete instrument was delivered. This was a very important change in the common law on this subject and very far reaching in its effect, but it does not affect the case before us. In the instant case, the defendant—the person who signed and delivered the incomplete instrument, in order that it might be converted into a negotiable instrument—introduced no evidence, nor was there any in the case, to rebut the *prima facie* authority of the plaintiff to complete the instrument given by the statute. Hence in the instant case, such authority is the same in effect as if it had been absolute, as at common law.

Therefore,

The first question we have to determine must be answered in the affirmative; and our conclusion is that the plaintiff had at one time the authority to complete the note sued on as he did.

But counsel for defendant contend that the plaintiff lost the authority to complete the note sued on by his failure to do so within a reasonable time. This brings us to the remaining question we have to consider, namely:

2. Were the blanks in the notes sued on filled up "within a reasonable time"?

Both at common law (7 Cyc. p. 622) and by virtue of the express provisions of said statute in Virginia, the blanks in an incomplete negotiable instrument must be filled "within a reasonable time" in order that the person in the position of the defendant in the instant case may be held bound thereon.

It has been held that the burden of proof under the negotiable instrument law, is upon the plaintiff—the subsequent holder of the note for value—to show that the instrument was completed within a reasonable time. (*Madden* v. *Gaston*, 137 App. Div. 294, 121 N. Y. Supp. 952). It is unnecessary, however, for us to pass on such question in the case before us.

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What is a reasonable time in such a case is usually a question for the jury (7 Cyc. p. 622). As when the facts are doubtful or disputed. (*Hill* v. *Hobart*, 16 Me. 164). But "when the facts are clearly established, or undisputed, or admitted, the reasonable time is a question of law." (*Idem.*)

The demurrer to evidence in the instant case avoids any controversy as to the facts. When the facts thus ascertained are such that reasonable minds could draw but one conclusion therefrom, it is for the court to draw that conclusion as a matter of law. (*Recker* v. *Southern R. Co.*, 115 Va. 201, 78 S. E. 580.)

Upon the facts of the case, ascertained upon the demurrer to evidence, the purpose for which the note sued on was delivered to the plaintiff was to secure and save him harmless from loss by reason of his becoming bound to pay any subsequent note he might endorse for W. A. Thomas, as well as the note he endorsed for him on October 10, 1913. The plaintiff in fact subsequently endorsed another such note, on July 10, 1915. W. A. Thomas died one month and nineteen days thereafter. It was not until his death that it could be determined that plaintiff might not be asked by him and consent to endorse other notes for him. The next day after such death, the blanks were filled up by plaintiff and the note completed. It could not have been completed before the death of W. A. Thomas, and have accomplished the purpose for which it was delivered to the plaintiff. It is clear, therefore, that in the instant case, the note was completed within a reasonable time.

For the foregoing reasons we are of opinion that the trial court should have overruled the demurrer to evidence and entered judgment for the plaintiff. The judgment complained of will therefore be reversed and such judgment will be entered by us as should have been entered by the court below.

Reversed.

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Syllabus.

Wytheville.

THE CAPE CHARLES BANK, INC., ETC., v. FARMERS MUTUAL EXCHANGE, ETC., INC., AND OTHERS.

June 14, 1917.

Absent, Burks, J.

1. BILLS AND NOTES—*Extension of Time of Payment by Holder.*—By the common law and the negotiable instruments law, Code of 1904, section 2841, sub-section 120, sub-division 6, a party secondarily liable on a negotiable instrument is released, "By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."
2. BILLS AND NOTES—*Extension of Time of Payment—Burden of Proof.*—Where the defense to an action on a negotiable instrument is a release by such an agreement, the burden of proving the existence of the agreement rests upon the defendant.
3. BILLS AND NOTES—*Extension of Time of Payment by Holder—What Constitutes Such an Agreement.*—The agreement in question contemplated by the above statute and by the rule at common law which it enacts, need not be express. It may be implied from acts, declarations, facts and circumstances. Its form is immaterial. It may be by parol as well as in writing. It must, however, be a binding contract, enforceable at law or in equity. It must be supported by a valuable consideration. It must be for a definite period, however short. When implied in law it is still a contract in fact and not in law, and hence an actual meeting of the minds of the contracting parties is essential to such an agreement, to bring it within the operation of the statute and common law rule.
4. BILLS AND NOTES—*Extension of Time of Payment by Holder—Existence of Agreement a Question of Law or Fact.*—In every case where the existence of an agreement such as mentioned in the statute is relied on by a person secondarily liable as

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a discharge of such liability, the question of the existence of such an agreement is a mixed question of law and fact; and when the mutual agreement is to be gathered from the acts of the parties, their situation and the surrounding circumstances, it is for the jury to determine what were the intention and understanding upon which the minds of the parties met. If the facts and circumstances are all ascertained, whether they constitute such an agreement is, of course, a question of law for the court.

5. BILLS AND NOTES—*Extension of Time of Payment by Holder—Payment of Interest in Advance.*—While payment and acceptance of interest in advance is not in itself an agreement to extend the time of payment of the obligation on which the interest is paid, yet it is evidence tending to prove the existence of such an agreement, and in the absence of any other evidence bearing upon the negative of the question, such payment and acceptance of interest affords *prima facie* evidence of the existence of such an agreement. However, when there is other evidence such as the acts, situation of and circumstances which surround the parties, but slight evidence to the contrary will rebut the *prima facie* case made by the evidence of payment and acceptance of interest in advance.

6. BILLS AND NOTES—*Extension of Time of Payment by Holder—Payment of Interest in Advance—Case at Bar.*—The instant case was not submitted on the bare facts of payment and acceptance of interest in advance. All the officers of the plaintiff and its assignor bank testified in rebuttal of the *prima facie* case which such payment and acceptance might otherwise have made out. This and the evidence as to the situation of the parties, their relations to each other and the surrounding circumstances warranted the jury in finding that there was not in fact any meeting of the minds of the maker and holders of the note sued on upon any agreement to extend the time of payment or to postpone the right to enforce the note sued on.

Error to a judgment of the Circuit Court of Northampton county, in an action of debt. Judgment for the defendants. Plaintiff assigns error.

Reversed.

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STATEMENT OF THE CASE AND FACTS BY SIMS, J.

This is an action of debt on a certain negotiable note for $8,000.00 by the plaintiff in error, the assignee and holder thereof for value against the maker and certain endorsers thereof, the latter being the defendants in error. The maker of the note was the Farmers Mutual Exchange, etc., Inc., a mutual company of which the defendant endorsers were stockholders. Its business was the marketing of the farm products of its stockholders, selling, accounting and paying over to them the proceeds of sales of such products. It had no assets except the capital provided by the money borrowed upon said note and other like notes. The note sued on became due and payable November 10, 1911, but nothing was then paid thereon. Subsequently, payments were made thereon by the maker and entries of credits therefor were entered on the back of said note, and on a collateral note pinned thereto, as follows:

"4-18-12 Int. paid to 3-10-12 (160.00)."

"4-26-12 Int. paid to 5-25-12 (100.00)."

"Int. paid to August 28, 1912."

"July 5, 1913, by Pe C. K. $2,000.00."

"July 5, 1913, by Int. $409.33."

There was then left a balance of $6,000.00 and interest thereon from July 5, 1913, unpaid on said note.

Out of the one hundred dollar payment of interest credited on April 26, 1912, above noted, arose the controversy on the merits of this case before us.

As will be noted this was a payment of interest in advance of its accrual. This payment was made by check of said maker of the note sued on, sent to the assignor of plaintiff by mail, accompanied by the following letter:

"L. E. Mumford Banking Co.,

"Cape Charles, Va.

"Gentlemen:

"Replying to your favor of the 24th instant, also Mr.

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Powell's conversation to me last P. M. Check herewith enclosed for $100.00, same being interest on note in question.

"Yours very truly,

"(Signed) Farmers Mutual Exchange,

"C. W." "Secy. and Treas'r."

(This letter was written by Mr. Claude while the secretary and treasurer of the Farmers Mutual Exchange.)

This letter was received by said assignor of plaintiff on April 26, 1912, the $100.00 accepted, and, by direction of Mr. Powell, the president of said assignor, its bookkeeper entered the credit therefor on the back of said note above noted, to the effect that it credited interest paid thereon to May 25, 1912, practically two months in advance.

Mr. Powell testified in effect that he as president of the assignor of plaintiff, after the note fell due, made repeated demands of the maker for payment; that the letter of such assignor, referred to in the April 25, 1912, letter of said maker of said note, contained, and his conversation also referred to in such letter consisted, merely in urging payment of the note and that no extension of time on the note was asked for by said maker or its secretary and treasurer or promised by him or his company, the said assignor of the note.

There was further testimony tending to show and from which the jury were warranted in finding as facts, that the maker of said note was in failing circumstances when said $100.00 payment was made, but that it was manifest that a suit against it on the note would not have been to the advantage of the holder of the note. That the best business course for such holder was to get such partial payment as it could from the maker from time to time, at least to the extent of preventing the debt from growing larger by accumulation of interest thereon. That a suit on the note would have meant ending the existence of the maker, a

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mutual company, in whose continued existence its stockholders, who were for the most part influential business men, were interested. That indeed, a suit on the note would be a suit against such stockholders also, who were endorsers on the note, whom the said assignor, itself a bank of the same community, would hesitate to offend. That the endorsers on the note were of such ample financial worth as to make the debt absolutely safe and a desirable loan for a bank to hold if the interest was kept paid up. That, therefore, the situation of the parties and surrounding circumstances, made it manifest that suit on the note was not to be apprehended as long as interest was kept paid up and none of the endorsers themselves required it. That hence there was no need or thought on the part of said maker to stipulate for or to obtain any agreement on the part of the holder of the note to extend the time of payment. That, hence, the payment of the $100.00 interest was consistent with the idea that its sole purpose was to comply with the demand of payment aforesaid as far as it was then in the power of the maker of the note, with the purpose of preventing interest accumulating on it so as to make it against good banking rules for the bank, its holder, to hold such note, which the maker naturally expected it would otherwise do for the business reasons above suggested, without any agreement so to do.

The further material facts on the merits of the case are as follows:

The evidence for the plaintiff shows affirmatively that neither it nor the assignor of the note sued on was ever asked to agree to any extension of time of payment of such note; that neither ever intended to make any such agreement, or knowingly did any act to have that effect, and that neither of them ever in fact made any such agreement, unless the acceptance of the interest in advance as aforesaid had that effect.

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No endorser on said note requested the plaintiff to collect the note, until August 18, 1913, when fifteen of the twenty-seven endorsers thereof requested plaintiff to institute suit against all of the endorsers, if the note was not paid on or before September 1, 1913. The maker of the note had then ceased to do business, as it seems from the record. The suit was thereafter accordingly instituted. After the institution of the suit the said maker was declared a bankrupt.

The endorsers of the note had no knowledge of the payment and acceptance aforesaid of said interest in advance until after the suit was brought.

SUMMARY OF FACTS.

As bearing on the one question in controversy on the merits of the case, the facts do not consist merely of the payment by the maker of a note of interest thereon in advance and the acceptance thereof by the holder of the note. There are other facts and circumstances, some of which are above indicated, bearing on the inference to be drawn or the implication to be made, if any, from such payment and acceptance, with respect to the existence or non-existence of an agreement on the part of the holder of said note to extend the time of payment thereof.

Upon the first trial of the case the jury rendered a verdict in favor of the plaintiff against the defendant endorsers for said balance of $6,000.00 with interest thereon from July 5, 1913. Thereupon at the same term on motion of the said defendant the trial court set aside such verdict and granted the defendant a new trial. By subsequent proceedings, not necessary to be mentioned in detail, the case is now before us for the determination of whether there was error in said action of the court below in setting aside the said verdict and granting a new trial. In the view we take of the case

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such determination involves the consideration of only one question in controversy on the merits of the case.

J. Brooks Mapp, for the plaintiff in error.

Benj. T. Gunter, Jr., and *S. J. Turlington*, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

Upon the merits of the case the defendants rely upon subdivision 6 of sub-section 120 of section 2841 of the negotiable instruments law, Pollard's Code of Va. 1904, which provides with respect to what will release parties secondarily liable on negotiable instruments, as follows: That such parties will be released—

"By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."

This rule was the same at common law (3 R. C. L. sec. 506; *Baird* v. *Rice*, 1 Call (5 Va.) 18, 1 Am. Dec. 497; 24 Am. & Eng. Encyc. of Law (1894) 822 et seq.; *Alcock* v. *Hill*, 4 Leigh (31 Va.) 626; 3 R. C. L. sec. 505; See also 2 Daniel on Negotiable Instruments (6th ed.), sec. 1312; hence the statute does not aid us in the application of such rule to the question in controversy on the merits upon which the instant case turns. That question is as follows:

1. Was there, in the case at bar, any agreement binding upon the plaintiff, or its assignor, to extend the time of payment or to postpone the right to enforce the note sued on?

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This is a matter of defense alleged by the defendants and the burden of proving the existence of such an agreement rested upon them. 32 Cyc. 213.

The agreement in question contemplated by the above quoted statute and by the rule at common law which it enacts, need not be express. It may be implied from acts, declarations, facts and circumstances (32 Cyc. 198; Crawford's Anno. Neg. Inst. Law, p. 85, note). Its form is immaterial. It may be by parol as well as in writing (32 Cyc. 198; 3 R. C. L. sec. 507). It must, however, be a binding contract (32 Cyc. 197; *Vaughan* v. *Vernon*, 82 Ark. 28, 100 S. W. 92), enforceable at law or in equity. 32 Cyc. 198. Also see *Armistead* v. *Ward*, 2 Pat. & H. (Va.) 504 for dictum of this court; *Coffman* v. *Moore's Ex'ors*, 29 Gratt. (70 Va.) 244; and see opinion of Kent, Chancellor, 8 Am. Dec. 424 et seq., and cases cited. It must be supported by a valuable consideration. *Oberndorf* v. *Bank*, 31 Md. 126, 1 Am. Rep. 31; 32 Cyc. 199; note of Prof. Lile, 4 Va. Law Reg. 262; note 11 Am. Dec. 590. It must be for a definite period, however short. *Reese* v. *Barrington*, 2 White & Tudor's Eq. Cas. pt. 2, p. 312; 32 Cyc. 202; 3 R. C. L., sec. 507. When implied in law it is still a contract in fact and not in law (*Guerguin* v. *Boone*, 33 Tex. Civ. App. 622, 77 S. W. 630), and hence an actual meeting of the minds of the contracting parties is essential to such an agreement, to bring it within the operation of the statute and common law rule which the latter has enacted.

In every case where the existence of an agreement such as mentioned in said statute is relied on by a person secondarily liable as a discharge of such liability the question of the existence of such an agreement is a mixed question of law and fact; and when the mutual agreement is to be gathered from the acts of the parties, their situation and the surrounding circumstances, it is for the jury to determine what were the intention and understanding upon

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which the minds of the parties met. *Brooks* v. *Wright*, 13 Allen (Mass.) 72. If the facts and circumstances are all ascertained, whether they constitute such an agreement is, of course, a question of law for the court. (*Idem.*)

Whether such an agreement exists, is the ultimate question in every such case.

Where such an agreement is not express, but is sought to be implied from the acts of the parties, their situation and the surrounding circumstances, the case is simple or complex in proportion as we find present a few, or a number of acts, and as we find those acts unaffected or affected by the situation of the parties and the surrounding circumstances.

If there be present in a case the bare facts of the payment and acceptance of interest in advance, the evidence being silent as to the actual intention of the parties, and there being nothing in their situation or in the surrounding circumstances to negative the fact that the minds of the parties met on an agreement to extend the time of payment of the obligation on which interest in advance is paid, the authorities are in conflict as to whether such mere payment and acceptance of interest in advance is sufficient evidence of the existence of such an agreement. The weight of authority and reason seems to be in favor of the proposition that while payment and acceptance of interest in advance is not in itself an agreement to extend the time of payment of the obligation on which the interest is paid, yet it is evidence tending to prove the existence of such an agreement, and in the absence of any other evidence bearing upon the negative of the question, such payment and acceptance of interest affords *prima facie* evidence of the existence of such an agreement. (*Armistead* v. *Ward*, 2 Pat. & H. [Va.] 504 for dictum of this court; 5 Rob. Prac. 787; 32 Cyc. 208 note 5 citing cases which show that such is the rule prevailing in Georgia, Indiana, New Hampshire, North Carolina, Ohio, South Carolina, Texas, Wisconsin

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and Wyoming. The same rule seems to obtain in Washington, see *Bank* v. *Jeffs*, 18 Wash. 135, 51 Pac. 348, 63 Am. St. Rep. 875, and in Connecticut, *Skelly* v. *Bristol Savings Bank*, 63 Conn. 83, 26 Atl. 474, 19 L. R. A. 599. 38 Am. St. Rep. 340). A contrary view, namely, that the payment and acceptance of interest in advance are not circumstances sufficient in themselves to afford even *prima facie* evidence of an agreement such as we have under consideration, seems to be taken of the subject in the State of Massachusetts. *Oxford Bank* v. *Lewis*, 8 Pick. (Mass.) 458; *Blackstone Bank* v. *Hill*, 10 Pick. (Mass.) 129; *Haddenville Savings Bank* v. *Parsons*, 138 Mass. 53; Maine: *Mariner's Bank* v. *Abbott*, 28 Me. 280; *Freeman's Bank* v. *Rollins*, 13 Me. 202; Missouri: *Hosea* v. *Rowley*, 57 Mo. 357; California: *Hellier* v. *Russell*, 136 Cal. 143, 68 Pac. 581. See also note 81 to section 1317, 2 Daniel on Neg. Instr., for cases on this subject.

However, even in those jurisdictions where the effect is given above mentioned to the payment and acceptance of interest in advance as *prima facie* evidence, when there is other evidence such as the acts, situation of and circumstances which surround the parties, but slight evidence to the contrary will rebut the *prima facie* case made by the evidence of payment and acceptance of interest in advance. For instance, in Ohio, where the *prima facie* rule prevails referred to, in *Denison University* v. *Mannina*, 65 O. St. 138, 61 N. E. 706, the court in its opinion said:

"Under the view taken of preceding questions, it is possible to decide the case without considering the effect of the evidence respecting the claim of the extention of time. Yet the question is made upon record, and may properly receive attention. The claim rests wholly on the effect of the endorsement of interest of date April 15, 1891, which is; 'Paid six months' interest, to April 30, 1891, $210.00.' It is urged that this implies necessarily that there was an agree-

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ment to extend the payment for a definite period, to-wit, 15 days. But does it? Such endorsements have been the subject of controversy in many cases. It is observed in some opinions that it is *prima facie* evidence of an extension. We know of no case where it is held to be conclusive. While, as a matter of law, the length of time is not important, yet it strikes one as improbable that there should be negotiation between parties situated as these persons were for an extension of only 15 days, and we look, therefore, to their acts and conversation to discover what was in fact said and done. The payment was made by George A. Slaght (a witness for the defendants at the trial) to Mr. Crawford. The witness does not say a word about a request for an extension, nor an agreement to extend. He does not recall the exact words, but says that he went into the bank where Mr. Crawford was, and made him understand that he wished to pay interest on that note, that he paid it, took a receipt for it, and went his way. Mr. Crawford, when called shortly after by the plaintiff, testified that George Slaght made that payment of interest; that Slaght said he had traded for the property, and beyond that nothing was said. He further testified positively that he was never asked to extend the time nor receive interest in advance. There is no denial of this statement, although the defendant's witnesses were presumably present, or at least within reach of process. Any possible inference favorable to defendants from that endorsement was thus effectually rebutted, and it left the conclusion that the payment of interest was made at the time as a matter of convenience to Slaght, and without any understanding at all that an extension of time for the payment of the principal had been had, or even requested."

So in the instant case it was not submitted on the bare facts of payment and acceptance of interest in advance. All the officers of the plaintiff and its assignor bank testified in rebuttal of the *prima facie* case which such payment and

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acceptance might otherwise have made out. The officer of the maker of the note who made the payment in question was examined as a witness. This and the evidence as to the situation of the parties, their relations to each other and the surrounding circumstances warranted the jury in finding as they did, that there was not in fact any meeting of the minds of the maker and holders of the note sued on upon any agreement such as alleged by the defendant endorsers.

As said by this court in *Calloway's Adm'r.* v. *Price*, 32 Gratt. (73 Va.) 1, in relation to the question of whether the taking of collateral security by the holder of a debt evidenced an agreement to extend the time of payment thereof so as to operate as a release of the surety, in the opinion by Staples, J.:

"In some of the cases it is held that taking the negotiable security creates a conclusive presumption of law of an agreement to suspend. In other cases it is held, and with better reason, it is simply a question of intention."

So in the case at bar it was a question of fact for the jury to ascertain with what intention the interest was paid and accepted in advance. The latter, in the absence of other evidence bearing upon such intention, would have been sufficient evidence that the intention was to extend the time of payment of the debt. But in the presence of the other evidence aforesaid the question of the existence of such intention was for the jury.

Further, as above stated, there was sufficient evidence to warrant the jury in finding, as they did, that no such intention existed.

We are, therefore, of opinion that the action of the court below in setting aside the verdict of the jury was erroneous.

This being our conclusion on the merits of the case it becomes unnecessary for us to review the action of the trial court with respect to allowing a new trial without the

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prepayment of the costs of the former trial, etc., except to say that we are of opinion that the defendants in error should bear and pay the costs of all of the trials in the court below as well as the costs in this court.

For the reasons stated above we are of opinion to reverse the judgment complained of and this court will enter such judgment as the court below should have entered.

Reversed.

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Wytheville.

CHESAPEAKE AND OHIO RAILWAY COMPANY v. JONES.

June 14, 1917.

Absent, Burks, J.

1. CONTRIBUTORY NEGLIGENCE—*General Rule.*—Wherever the negligence of the plaintiff contributes proximately and efficiently to his injury, there can be no recovery.
2. CARRIERS OF PASSENGERS—*Contributory Negligence.*—Plaintiff accompanied, as care-taker, two new locomotives (dead engines) over the line of the defendant company. His fare as a passenger was paid, and he traveled in one of the engines, both of which were being hauled on their own wheels as parts of a through freight train. Plaintiff inquired of the conductor when and where the train would stop, so as to give him an opportunity to oil his engine. The conductor replied that there would be frequent stops and plaintiff would have ample time to oil and inspect the engine. The train stopped for a moment on an automatic block signal. Plaintiff, without communicating with the train crew, within a minute after the train stopped, alighted from the cab of his engine and stood on the piston-rod, for the purpose of examining and oiling the engine.

   Held: That plaintiff was guilty of contributory negligence, which barred his recovery for injuries occasioned by the starting of the train while he stood upon the piston-rod.

Error to a judgment of the Hustings Court, Part II, of the city of Richmond, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

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D. H. & Walter Leake and *Henry Taylor, Jr.*, for the plaintiff in error.

L. O. Wendenburg and *T. Gray Haddon*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This is an action for personal injuries, in which the judgment under review was rendered in favor of L. J. Jones, the plaintiff, against the Chesapeake and Ohio Railway Company upon a demurrer to the evidence.

Several grounds of error are assigned, but inasmuch as we think the trial court erred in overruling the demurrer to the evidence, which necessitates a reversal of the judgment on the merits, we need only notice that assignment.

The plaintiff was an employee of the Richmond branch of the American Locomotive Works, and was ordered to accompany, as care-taker, two new locomotives (dead engines) over the line of the defendant company from Richmond, Virginia, to Cincinnati, Ohio, there to be delivered to the Big Four Railroad Company. His fare as a passenger was paid, and he traveled in one of the engines, both of which were being hauled on their own wheels as parts of a through freight train.

Before reaching Huntington, West Virginia, the engines were "running hot," and were withdrawn from the train and overhauled in the shops at that place. Afterwards, they were again taken up by another through freight train, consisting of fifty-one coal cars, their position in the train being "ten car lengths behind the engine" that was pulling the train; so that there were forty or forty-one coal cars between the "dead engines" and the caboose car in which the conductor was riding.

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After necessary work had been done on these engines, on the evening of November 12, 1913, they were taken up by the freight train of the defendant above referred to. The plaintiff informed the conductor of his previous experience with the engines, and explained the necessity for maintaining a speed of not over fifteen miles an hour, and the urgency for extra precaution on plaintiff's part to keep the engines oiled to prevent a recurrence of the trouble. Plaintiff's relation of the happening of the accident was this: "I said (to the conductor) where will be the first place you stop? As I said that, the train pulled in two * * And he laughed and said, 'Right here.' I said, 'I am not fooling about that now, because it is absolutely necessary; that engine has been hot; it has just been fixed; it has not been run since it was fixed, and it is absolutely necessary for me to examine it and oil it, and I would like to know when and where you are going to stop.' He said, 'We will be stopping all the way between here and Russell, taking off and putting on cars, and you will have ample time to inspect and oil your engine.' The first stop we made was on a trestle; on the right hand side right down in a hole; there was a double track and no bridge on the inside and I couldn't get out. * * We moved off and went up to the next stop; I don't know how far, possibly two miles, or probably more or less, I don't know, and we stopped there. When I found they were going to stop, as usual I got out on the bottom step with the oil can in my hand and lantern on my arm, so I could put the oil on in the shortest possible time. I stood on the step waiting to see if he was going to stop for a water tank. I had no way of telling what he was going to stop for. After waiting a reasonable time, say, a minute or such a matter—They usually, if they pass a tank or don't go far enough * * move up or move back. After finding he didn't do it, I took for granted that that was my opportunity, and I went to this box, particularly the one that had

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been getting hot; I didn't have time or didn't attempt to go to any other. I smacked my hand on the outside and found it was warm. I was in the act of stepping up with the oil can to put oil on the inside on the swath and see the condition of the box. The minute I stepped on that rod, the time I got my weight up, before I could feel the box or anything, the train started and caught my foot. I tried to pull it out, but could not pull it out, just had to stand there in misery until the wheel made a whole revolution. After it got out I dropped to the ground. The grab irons on the side of the tank and engine were low enough to catch and I caught hold of that and crawled up into the cab. I had always kept my red lamp with me in the tank. I took the red lamp and waved it at that side and went to the other side and waved it out. If they saw it they did not heed it. I opened the angle cock underneath the engineer's valve and put the handle in emergency. Then the train came to a stop after it had run possibly half a mile * * * Some young men were alongside, and I asked some of them to phone for an ambulance. Some of them notified the train crew. Then the conductor came and said he was very sorry I was hurt. I told him that I was, too, and that I needed attention. He wanted to know could I go on to Russell. I told him no sir, my foot was in a dangerous condition and I would have to have attention immediately. He said some one had phoned for the ambulance. I notified him to set the engines off at Ashland." Plaintiff was then taken to the hospital, where the big toe was amputated.

The accident occurred in the night time, and the first intimation the conductor or engineer had of plaintiff's danger, or that he had been hurt, was after the train stopped at Ashland, fifteen miles from Huntington. They had no notification whatever from the plaintiff or from any other source that he had left the cab of his engine, or that he had any such purpose. The train stopped for a moment on

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an automatic block signal. When another train is in the same block the signal automatically shows red, and under the rules of the company the train receiving the signal must wait one minute, and then move forward if it does not come white; and that was what was done in this instance. No other signal is given or allowed to be given except the block signal, which, as remarked, is automatic. The plaintiff's own evidence shows that he had no assurance of safety from the conductor in the circumstances narrated, nor was it possible for him to have protected the plaintiff from the consequences of his own imprudence. His version of the occurrence is, that he reached the conclusion from the character of the stop that it was not for the purpose of taking on water; and upon his own initiative he assumed the risk of examining and oiling the engine. Accordingly, within a minute after the train stopped, equipped with a lantern and oil can, he alighted from the cab of his engine and climbed up and stood on the piston-rod, which he must have known was fraught with unescapable danger if the train should move forward. Yet he says: "I took for granted that that was my opportunity * * *" Of his own volition, he left a place of safety and placed himself in a position of imminent peril, though he admits that he did not know what the train stopped for, or how long it was going to stay; and he took this hazard without apprising the train crew of his purpose, or, in any way, attempting to put himself in communication with them.

It seems clear to us that, taking the statement attributed by the plaintiff to the conductor, "that he would have ample time to inspect and oil his engine," at its face value, it was never contemplated that he would attempt to do so under the conditions disclosed by the record. By no reasonable rule of construction can the language imputed to the conductor admit of such interpretation. One may not thus

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gamble with danger and visit the loss upon an innocent third party.

It is well settled in this jurisdiction that wherever the negligence of the plaintiff contributes proximately and efficiently to his injury, there can be no recovery. *Pennsylvania R. Co.* v. *Jenkins,* 119 Va. 186, 89 S. E. 96.

It follows from these considerations that the judgment of the hustings court must be reversed, the demurrer to the evidence sustained, and judgment rendered for the plaintiff in error, the Chesapeake and Ohio Railway Company.

Reversed.

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Syllabus.

Wytheville.

CHESAPEAKE AND OHIO RAILWAY COMPANY v. MAY AND OTHERS.

June 14, 1917.

Absent, Burks and Sims, JJ.

1. FIRES—*Measure of Damages—Cost of Replacing Houses.*—Defendant railroad, in an action for the destruction of buildings by fire, requested the court to instruct the jury that the measure of damages for houses destroyed by fire was "the value of such houses at the time and place of destruction, and that the cost of replacing the houses is not the proper measure of damages in such case and should not be considered by the jury in estimating damages." The court substituted for the language after the word "destruction," "and the cost of replacing the houses is not by itself the proper measure of damages in such case but should be considered by the jury in estimating damages."

   Held: That this modification did not constitute prejudicial error, if error at all.

2. FIRES—*Measure of Damages—Personal Property.*—In such an action defendant requested the court to instruct the jury that the measure of damages for personal property destroyed was the market value of such property. The court modified the instruction by substituting the words "proven value" for "market value."

   Held: No error, it not appearing that there was any market value for the property, and the evidence of the plaintiffs establishing the proven value being practically unchallenged by the evidence on behalf of the defendant.

3. FIRES—*Damages—Evidence of Adaptability of Property Destroyed for a Particular Use.*—In an action for the destruction of property by fire, evidence is admissible as to the location of the property destroyed with reference to its adaptability for school and other purposes. The measure of damages is the market value of the property at the place where it is located; and if the uses to which it had been devoted and for which it was available, together with its location, tended to

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increase its market value, there is no rule of law or reason why these elements of value should be excluded from the consideration of the jury.

4. FIRES—*Damages—Evidence of Sentimental Value.*—The rights of the defendant were safe-guarded with respect to the evidence of plaintiff attaching a sentimental value to two portraits destroyed by fire, where the court instructed the jury that in estimating damages, they could not take into consideration any sentimental value attached to the property by its owners.

5. FIRES—*Damages—Conflicting Instructions.*—The court instructed the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiffs' bill of particulars, which had a peculiar value to plaintiffs, they must determine from all of the evidence what was the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof.

Held: That this instruction was not in conflict with the previous instruction that the jury should not take into consideration any sentimental value attached to the property by its owners.

6. HEARSAY EVIDENCE—*Expert and Opinion Evidence—Memorandum.*—In an action for the destruction of property by fire, exception was taken to the introduction of certain plans of the dwelling house by the plaintiff, because made by an expert, from information derived from plaintiff. The plans were not relied on as possessing any probative value, but were merely employed by way of illustration by the opinion witnesses; and besides, the opinions of the experts were shown to have been predicated upon the truth of plaintiff's testimony.

Held: That there was no force in the exception.

7. WITNESSES—*Memorandum.*—Plaintiff, in testifying to the value of the personal property, used an inventory of the articles destroyed. This inventory was prepared in part from information derived from other persons. As the inventory was not introduced or relied on as evidence, but was used as a memorandum by the witness while testifying before the jury, an exception to its use was without merit.

8. APPEAL AND ERROR—*Harmless Error—Introduction of Evidence.*—Many years prior to the fire plaintiffs had the complete equitable title to the property destroyed. Defendant excepted to the introduction of a deed to plaintiffs made after the action was brought.

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Held: That the action of the beneficial owner to recover damages for injury to the property by fire could have been maintained as well without the deed as with it. So that, even if the deed was erroneously admitted, the error was harmless.

9. CONSTITUTIONAL LAW—*Construction of Act by Court.*—The constitutionality of a statute cannot be made to depend upon the construction put upon it by the court. If an act be constitutional upon its face, it cannot be made unconstitutional by an erroneous interpretation or an improper application of it by the court.

10. INSTRUCTIONS—*Not Based on Evidence.*—The trial court is warranted in refusing to give an instruction, where there is no evidence upon which to base it.

11. FIRES—*Damages.*—In an action for property destroyed by fire, the jury may consider separately damages for the destruction of the buildings from damages to the freehold.

12. FIRES—*Weight and Sufficiency of Evidence.*—Where the circumstances justify the jury in finding that the fire was set out by the defendant's engine, greater particularity of proof is not required.

13. FIRES—*Constitutional Law.*—The Act of the General Assembly (Acts 1908, p. 388), declaring the liability of railroads for damages from fires occasioned by sparks or coals dropped or thrown from an engine or train, is constitutional.

Error to a judgment of the Circuit Court of Louisa county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

D. H. & Walter Leake and *Henry Taylor, Jr.*, for the plaintiff in error.

Leake & Buford, Gordon & Gordon, C. V. Meredith and *J. G. May*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This action was brought by the defendants in error against the plaintiff in error (hereinafter referred to as

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plaintiffs and defendant) to recover damages for the destruction of their dwelling and out-houses and personal property and timber by fire, alleged to have originated on the defendant's right of way and to have been occasioned by sparks or coals dropped or thrown from its engine or train. The action was prosecuted primarily for the benefit of the plaintiffs, and incidentally for the Virginia Fire and Marine Insurance Company, to the extent of $1,500, and for the German-American Insurance Company of New York for the sum of $1,000.

The evidence of the three witnesses who testified to the circumstances attending the commencement of the fire warranted the finding of the jury that it was set out by a passing train of the defendant, and destroyed the property of the plaintiffs, as charged in the declaration; and the defendant introduced no evidence tending to show that it was not responsible for the origin and escape of the fire. Therefore, further discussion of that branch of the case is unnecessary.

We shall next consider the assignments of error in the order in which they are stated in the petition for the writ of error.

1. Exception was taken to the admission of evidence—

(a) Touching the cost of replacing the buildings and certain personal property destroyed, because that did not constitute the proper measure of damages.

(b) Also as to the location of the property destroyed with reference to its adaptability for school purposes and other special uses, such considerations not being proper in estimating damages.

(c) Testimony of one of the plaintiffs as to a sentimental value attached by him to certain articles of personal property destroyed, such evidence not being proper to be considered in estimating damages.

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(d) Certain plans of the dwelling house introduced in evidence by one of the plaintiffs, it appearing that they were made by one Keenan from hearsay evidence.

(e) Evidence of the value of the dwelling house, which was hearsay.

(f) An inventory of personal property introduced by one of the plaintiffs, it appearing that it was made up in part from information derived from others.

(g) A deed to plaintiffs for sixty acres of land burned over, which was not obtained until after the bringing of the suit.

2. To giving instructions "A," "C," "D," and "E" for the plaintiffs.

3. To refusing instructions 1-a, 2, 3 and 9, for the defendant.

4. To modifying instructions 5, 6 and 8, requested by the defendant.

5. To refusing to set aside the verdict on the grounds stated above.

Paragraph (a) of assignment 1 should be considered in connection with the exception in assignment 4, to the modification of instructions 5 and 6.

Instruction 5, as requested, reads thus: "The court instructs the jury that the measure of damages for the houses destroyed * * * is the value of such houses at the time and place of destruction, and that the cost of replacing the houses is not the proper measure of damages in such case and should not be considered by the jury in estimating damages."

In the modified instruction, the court reiterates the principle as to the true measure of damages, but substitutes for the language after the word "destruction," in the original instruction, the following: "and the cost of replacing the houses is not by itself the proper measure of damages in such case but should be considered by the jury in estimating damages."

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We do not perceive that this modification constitutes prejudicial error, if error at all. The jury's attention had been distinctly drawn to the true measure of damages, and the cost of replacing the destroyed buildings was only used as one of the means of enabling them to ascertain the true value of the buildings at the time and place of destruction. In point of fact, no effort was made to recover the cost of replacing the buildings, but such cost, subject to proper deduction for deterioration in value from age and use was merely intended as an aid to the jury in ascertaining the correct measure of damage in accordance with the court's instruction. In this there was no error.

These instructions are not in conflict with the cases of *Norfolk & Western Ry. Co.* v. *Bohannon*, 85 Va. 293, 7 S. E. 236, and *Norfolk & Western Ry. Co.* v. *Thomas*, 110 Va. 622, 627, 66 S. E. 817. The first holds that the measure of damages for the destruction of an orchard of fruit trees by fire is the value of the trees. Practically the same rule is laid down in the second case as to damages for a building destroyed by fire; yet neither case lays down the means by which such value may be determined.

Instruction 6, as requested, reads: "The court instructs the jury that the measure of damages for the personal property destroyed is the market value of such property at the time and place of destruction and not the cost of replacing it." The court in the modified instruction substituted for the language, "the market value," the words, "the proven value."

It does not appear that there was any market value for the articles covered by the foregoing instructions at the place of loss, which fact may have been the reason for the change of phraseology from "market value" to "proven value;" but, however that may have been, it was not shown, and does not appear, that the change operated to the prejudice of the defendant. The fact that it was not preju-

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dicial is strengthened by the circumstance that the evidence of the plaintiffs establishing the "proven value" of the property was practically unchallenged by countervailing evidence on behalf of the defendant.

Paragraph (b) of assignment 1 excepts to the admissibility of evidence as to the location of the property destroyed with reference to its adaptability for school and other purposes, such considerations not being proper in estimating damages. In the circumstances of the particular case, we think the evidence was admissible. The building had been equipped with dormitories and used as a boarding school for boys; and evidence that it was well fitted and well located for that purpose naturally and proximately tended to influence its market value. The measure of damages, admittedly, is the market value of the property at the place where it is located; and if the uses to which it had been devoted and for which it was available, together with its location, tended to increase its market value, we know of no rule of law or reason why these elements of value should be excluded from the consideration of the jury.

There is nothing in the cases of *Burruss* v. *Hines*, 94 Va. 413, 26 S. E. 875, and *Fowlkes* v. *Southern R. Co.*, 96 Va. 743, 32 S. E. 464, which under the facts of this case requires the exclusion of such evidence. The former case announces the settled principle that damages to be recoverable must be natural and proximate, and not speculative and remote. The latter was a personal injury case in which the damages sought to be recovered were held to be too remote.

In support of the admissibility of the foregoing evidence, see, *West Chicago St. R. Co.* v. *City of Chicago*, 172 Ill. 198, 50 N. E. 185; *Schuster* v. *Sanitary Dist. of Chicago*, 177 Ill. 626, 52 N. E. 855; *Pegler* v. *Inhabitants of Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Farwell* v. *Chicago R.*

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L. & P. R. Co., 52 Neb. 614, 72 N. W. 1036; *Kansas City So. R. Co.* v. *Boles*, 88 Ark. 533, 115 S. W. 375; *City of Eldorado* v. *Scruggs*, 113 Ark. 239, 168 S. W. 846.

Paragraph (c) of assignment 1 excepts to the testimony of the plaintiff, John G. May, attaching a sentimental value to two portraits, because of his relation to the parties. The evidence was admitted subject to the ruling of the court upon the instructions. Instruction 7, given at the instance of the defendant, told the jury, "that in estimating damages to any of the property, real or personal, destroyed by fire in this case, they cannot take into consideration any sentimental value attached to it by the owners or any peculiar value which they may have attached to the property by reason of association or the like." This instruction safeguarded the rights of the defendant with respect to the evidence in question.

But it is further insisted that instruction "D" is in conflict with instruction 7.

Instruction "D" is as follows: "The court further instructs the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiffs' bill of particulars, which have a peculiar value to plaintiffs, they must determine from all of the evidence what is the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof, if they believe from the evidence that the fire which consumed these articles was put out by the engine or engines, or train or trains, of the defendant company, and spread from the right of way of the said company to the lands of the plaintiff, and consumed the same."

We do not think that instruction "D" conflicts with the principle announced in instruction 7. In instruction 7 the

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court distinctly told the jury that they could "not take into consideration any sentimental value," and instruction "D" tells them they must allow "a reasonable value." The articles possessing no market value, instruction "D" proceeds to inform the jury what elements they may consider in determining the reasonable money value of the property, and the instruction in that respect conforms to the authorities on the subject. *Green* v. *Railroad Co.*, 128 Mass. 221, 35 Am. Rep. 370; *St. Louis, I. M. & S. Ry. Co.* v. *Green*, 44 Tex. Civ. App. 13, 97 S. W. 531; *International, &c. Ry. Co.* v. *Nicholson*, 61 Tex. 550; *Denver, &c. R. Co.* v. *Frame*, 6 Col. 385; *Bateman* v. *Ryder*, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910; Hale on Damages, sec. 277.

Paragraphs (d) and (e) of assignment 1 except to the introduction of certain plans of the dwelling house, introduced in evidence by the plaintiff, John G. May, because made by Keenan, an expert builder, from information derived from May; and, therefore, his opinion as to the value of the building was based on hearsay evidence.

It is sufficient to say of this objection that the plans were not relied on as possessing any probative value in themselves, but were merely employed by way of illustration by the opinion witnesses; and, besides, the opinions of the expert witnesses are shown to have been predicated upon the truth of May's testimony as given before the jury.

Paragraph (f) of assignment 1 excepts to the use by John G. May, in testifying to the value of the personal property, of an inventory of the articles destroyed, because prepared in part from information derived from other persons. Again, let it be remembered that the inventory was not introduced or relied on as evidence, but was used as a memorandum by the witness while testifying before the jury.

Paragraph (g) of assignment 1 excepts to the introduction of a deed to plaintiffs, made after the action was brought, to 68 acres of land burned over by the fire.

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It is undisputed that for many years prior to the fire the parties had the complete equitable title to this land, though the evidence of such ownership, the deed, was obtained afterwards. The action of the real beneficial owner to recover damages for injury to the property by fire could have been maintained as well without the deed as with it. So that, even if the deed had been erroneously admitted, the error would have been harmless.

The second, third and fourth assignments of error are to the giving of instructions "A," "C," "D" and "E" for the plaintiffs, and the refusal to give instructions 1-a, 2, 3 and 9, requested by the defendant, and in modifying instructions 5, 6 and 8.

The objection to instruction "A" is that the act of the General Assembly upon which this action is based is unconstitutional.

The act is as follows: "Be it enacted by the General Assembly of Virginia, That whenever any person shall sustain damage from fire occasioned by sparks or coals dropped or thrown from the engine or train of any railroad company, such company shall be liable for the damage so sustained, whether said fire shall have originated on said company's right of way or not, and whether or not such engine is equipped with proper spark-arresting appliances, and regardless of the condition in which such appliances may be." Acts 1908, p. 388.

The contention, if we apprehend it, is not that the act is unconstitutional in itself, but that the construction placed upon it by the court in refusing instructions 1-a and 3, asked for by the defendant, renders it unconstitutional.

The Supreme Court of the United States has in two cases declared similar acts to be constitutional. See *St. Louis & San Francisco R. Co.* v. *Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.

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We cannot assent to the proposition that the constitutionality of the statute can be made to depend upon the construction put upon it by the court. If the act be constitutional upon its face, it cannot be made unconstitutional by an erroneous interpretation or an improper application of it by the court.

The trial court was well warranted in refusing to give instructions 1-a and 3, because there was no evidence upon which to base any instruction that the fire was started by matches, cigarettes, cigars, or the like, thrown from the train by a passenger.

Instruction "A" embodies the language of the act, and plainly told the jury for what acts of the defendant it was answerable in damages.

The objection to instruction "C" is that it permitted the jury to consider separately damages for the destruction of the buildings from "damages to the freehold." This objection is answered by the opinion of this court in *N. & W. Ry. Co.* v. *Thomas*, 110 Va. 622, 66 S. E. 817. It is said in that case, at p. 627: "In 33 Cyc. pp. 1391-1392, citing numerous cases, the rule is stated as follows: 'When buildings are injured or destroyed it is ordinarily held that they are capable of a separate valuation, and that the measure of damages is the value of the property at the time of its destruction.'" Necessarily, the personal property destroyed, having no connection with the real property, had to be valued separately. The evidence as to the loss of the grove was properly directed to prove by what amount its destruction diminished the market value of the property.

The objection to instruction "D" is: "first because it invited the jury to give sentimental damages; and, second, because it was based upon the statute hereinbefore referred to as being unconstitutional * * *" The second ground of objection is also made to instruction "E." These objec-

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tions have already been considered and need not be further noticed.

Instruction 2 was rightly refused. As we have seen, the circumstances justified the jury in finding that the fire was set out by the defendant's engine, and greater particularity of proof was not required. See *Patteson* v. *C. & O. Ry. Co.*, 94 Va., pp. 18-19.

The action of the court in modifying instructions 5 and 6 has also been considered.

In conclusion, we are of opinion that the case was fairly submitted to the jury on the law, and that the evidence was ample to sustain their finding.

For the foregoing reasons, the judgment is affirmed.

Affirmed.

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Wythville.

CITY OF RICHMOND V. VIRGINIA RAILWAY AND POWER COMPANY.

June 14, 1917.

Absent, Burks and Sims, JJ.

1. CONSTITUTIONAL LAW—*Obligation of Contracts—Street Railway Franchise.*—An ordinance granting the right to a company and imposing a corresponding duty to operate a street railway on the streets of a city, when accepted by the company, constitutes a binding contract, not subject to repeal, and protected against any impairment by the Constitution of the United States.
2. STREETS AND HIGHWAYS—*Bridges as Extension of Street.*—As a general proposition bridges, constituting extensions of streets, or connecting streets, are to all intents and purposes parts of such streets.
3. STREET RAILWAYS—*Bridges—Right to Operate Upon City Bridge.*—A street railway was authorized by an ordinance to operate on Fourteenth street (among others) to the city limits. In consideration of the privileges granted the street railway agreed to pay the city a percentage of its gross receipts. At the south end of Fourteenth street was a bridge which with its approach at the time of the passage of the ordinance was owned by a public utility company. The bridge while thus owned was popularly known as Fourteenth street, and the company operated its railway over the approach and bridge to the city limits. Under the statutes regulating the power of eminent domain the city condemned this bridge and its approach and built a new bridge across the river.

   Held: That the city had no right to impose a rental or toll charge upon the street railway for the use of the new bridge, and this notwithstanding that the statute authorizing the construction of bridges by the city contained a provision that the city might require compensation of transportation companies for the use of the bridges, and notwithstanding that the company by its charter was subject to all reasonable restrictions,

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limitations or agreement in operating its railway over bridges across the river imposed by the owners of the bridges.

Error to a judgment of the Law and Equity Court of the city of Richmond, in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

H. R. Pollard, for the plaintiff in error.

H. W. Anderson, A. B. Guigon and *T. Justin Moore,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The single issue involved in this case is whether, as contended by the city of Richmond, it has the right to impose a rental or toll charge upon the Virginia Railway and Power Company for the use of the new Mayo bridge across James river, recently constructed by the city, or whether, as contended by the company, such bridge is an extension of Fourteenth street, upon which the company has already been granted the right, and charged with the resulting duty of operating its cars, under the ordinance of December 23, 1899.

The pertinent facts are: That at the time of the adoption of the ordinance, the bridge, including its approach at the south end of Fourteenth street, was owned by the Mayo Land and Bridge Company. This approach to the bridge, extending from the northern margin of the canal at Dock street to the river, was 1,000 feet in length, and the bridge proper, including that portion of it on Mayo's Island, in the stream, was 1,748 feet in length, all of which was the property of the Bridge Company. This approach to the bridge,

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while thus owned, was open to the public and popularly known as Fourteenth street. By subsequent acts of the legislature, the city of Richmond was authorized to construct and maintain bridges over James river, and to condemn the necessary property therefor, whether already devoted to public uses or not. Pursuant thereto and under the statutes regulating the exercise of the power of eminent domain, the city condemned the bridge and its approach, from the northern end at 14th and Dock streets across the river to its south bank at the north end of Hull street, Manchester, now a part of the city of Richmond, sometimes called South Richmond.

The ordinance of December 23, 1899, granted to the predecessor in right and title of the company, permission to operate a street railway within the limits of the city of Richmond, over many of its streets, subject to many conditions and provisions set forth therein. The authority to operate the route on Fourteenth street reads thus:

"(9) Beginning at Fourteenth and Main streets and connecting with the Main street tracks, and a single track southwardly on Fourteenth street to the corporate limits."

Subdivision 4 of clause 2 of that franchise provides, among other things, that "The said company, on all of the paved streets of the city, whenever the tracks are ordered to be changed and on such streets as may hereafter be ordered to be paved, shall pave the space between all rails, including the space between its tracks where there are double tracks, switches or side tracks, and for a distance of two feet on the outside of the outer rails of its tracks, and, on all unpaved streets, shall put in good repair with such material as the city may use on said street, and so maintain the space between all rails, including the space between the tracks where there are double tracks, switches, or side-tracks, and for a distance of two feet on the outside of the outer rails of its tracks, without reference to the con-

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dition of the residue of the street, and shall from time to time make all necessary repairs in said space, under specifications, both as to construction and materials, and as to time of commencing and completing the work as may be prescribed by the committee on streets, under the supervision of the city engineer * * * and said company shall also construct and keep in good repair that part of the floors of all bridges or other structures owned, in whole or in part, or maintained by the city, crossed by any of its tracks, and for a distance of two feet on the outside of such outer rails, and also between the tracks where there are double tracks * * *."

It provides also that for the privileges granted the company shall pay to the city, as compensation, for the use of the streets and alleys, a percentage of its gross receipts ranging from 3½% to 10%. To these rental charges for the use and occupancy of the streets, there are added other requirements as to schedules of the cars, limiting the amount of the fares to be charged, and securing extensive and valuable transfer privileges to passengers.

The ordinance is very carefully drawn, the public interests are well safeguarded therein, and the privileges granted thereby are to continue for thirty years from the 1st day of January, 1900, unless voluntarily surrendered by the company, with the consent of the city council, or sooner forfeited.

When this ordinance was accepted by the company, it constituted a binding contract, not subject to repeal, and protected against any impairment by the Constitution of the United States.

It is freely conceded by counsel for the city that as a general proposition bridges, constituting extensions of streets, or connecting streets, are to all intents and purposes parts of such streets, and the authorities leave no doubt on this question. McQuillin on Mun. Corp. (1912),

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sec. 1282; *Pickett Co.* v. *Green Co.* 171 Ala. 377, 54 So. 998; *Sandpoint* v. *Doyle,* 14 Idaho 749, 95 Pac. 945, 17 L. R. A. (N. S.) 497; *McDonald* v. *City of Ashland,* 78 Wis. 251, 47 N. W. 434; *Birmingham* v. *Rochester City Ry. Co.,* 137 N. Y. 13, 32 N. E. 995, 18 L. R. A. 764; *Chicago* v. *Powers,* 42 Ill. 169, 89 Am. Dec. 418; *Cavender* v. *City of Charleston,* 62 W. Va. 654, 59 S. E. 732; *City of Goshen* v. *Myers,* 119 Ind. 196, 21 N. E. 657, 4 R. C. L. 195.

It is claimed, however, that inasmuch as at the time the ordinance here involved was adopted, the city did not own the bridge, and that it only became a part of the public street when built and completed by the city in 1914, therefore, the provisions of the ordinance cannot be held to apply thereto.

We cannot accept this construction of the ordinance. It was purposely and wisely so drawn as to meet such changing conditions as might intervene within thirty years; the references to streets and bridges therein contained must be construed to apply to the streets and bridges therein referred to, not only as they existed at the time the ordinance was adopted, but also as such highways might change for thirty years thereafter. The language used with reference to Fourteenth street, in view of the surrounding circumstances, is significant. It will be noted that although Fourteenth street was only owned by the city from Main street southward to Dock street, the ordinance, nevertheless, imposed upon the company the obligation to operate to the city limits, the city limits at that time being 2748 feet south of Dock street, across James river, at the foot of Hull street in Manchester. It was manifestly within the contemplation of both parties to the contract that cars should be operated to the city limits, and in order to perform the contract the company was obliged to pay the bridge company for its use of the bridge.

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The case here is precisely as if at the time of the contract a street had stopped short of the then city limits but the company had nevertheless been required to operate to such limits, over a route clearly indicated, and in order to do so had been forced to obtain permission from the private owners of the land from the end of such street to the city limits, and thereafter the city had condemned such private property and extended the street over such route. The company under such circumstances would still be bound to operate its cars over the extended street, under such a contract, and unless authorized by such contract, the city could charge no additional compensation for such use.

It being conceded that such new bridge, including its approach of 1,000 feet between Dock street and the north bank of the James river, together with that portion of it which is constructed on land, on Mayo's Island, as well as that part of it which spans the north and south branches of James river, constitutes a street of the city, and it being rightly claimed by the city that the company is by its contract compelled to operate thereon, it seems to us that it follows inevitably that the city can impose no burden except those which it imposed upon the company by the ordinance of December 23, 1899, which embodies that contract.

It is further argued by counsel for the city that its authority to collect such rental or toll charges is conferred by the statute giving the city of Richmond the authority to maintain and construct bridges across James river by reason of the express provision therein, that, while such bridges shall be free to the public, the city may require compensation of transmission or transportation companies for their use; and, furthermore, that this is emphasized by the fact that the legislative charters granted to the predecessors of the company, some of which were passed before and some passed since this contract was made, in substance provide, that the company in operating its rail-

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way over the bridges already, or any other bridges which might thereafter be, constructed to cross James river, shall be subject to all reasonable restrictions, limitations or agreements as may be imposed by the persons or corporations owning or controlling such bridges. We think, however, that this position is clearly unsound, because it may be confidently said that those statutes which were passed before this contract was entered into have been recognized in the contract, and the considerations paid and agreed to be paid by the company are the considerations which the owners of the bridges have agreed to accept for such use; while those statutes passed since the contract was made cannot be so construed as to interfere with or impair such contract. These subsequent statutes may indeed be easily reconciled with the contract under consideration, and should be construed to mean that tolls may be charged transportation or transmission companies for the use of such bridges as are thereafter built by the city, unless the city has already precluded itself from imposing such tolls by contracts entered into before the statutes were passed.

Our conclusion, therefore, accords with the conclusion of the learned judge of the Law and Equity Court of the city of Richmond. He has thus expressed his views upon the question involved:

"Under the terms of the stipulation between the parties the adjudication of this case is made to turn upon the decision of the question of the power and authority of the city to own and manage the new Mayo Bridge as a toll bridge, in so far as the defendant transportation company is concerned, and so to require the company to pay an annual toll or charge for the use of the bridge.

"If this basic question is determined in favor of the city then it has the right to require the defendant company to pay an annual charge for the use of the bridge and to en-

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force payment of a reasonable amount for that purpose by appropriate judicial proceedings. If the city is without such authority it cannot recover against the defendant company.

"It is clear that the acquisition of the right of way for the bridge was had under our general condemnation statutes, and that 'the bridge was constructed and opened by the city altogether as a public improvement and solely for public uses, and not in any way as an incidental investment by the city of municipal funds yielding a pecuniary return.' It is a substantial permanent structure and was intended for and is a public highway open and free to the use of citizens and in that respect does not differ from any other public street of the city.

"The south side of the river is now a part of the city of Richmond and Fourteenth street is a continuous public highway from its intersection with Main street to the southern limits of the city.

"I think the bridge is obliged to be taken as a part of a a continuous public street.

"Under our Constitution and statutes a street railroad cannot operate in the streets of a city without having previously obained the consent of the municipal authorities. If in the present case that consent has never been given, then the defendant company has no right to run over the bridge, and can be forced to cease operating its cars at each end of the bridge. The consent of the municipal authorities to the occupancy of the streets by a railroad company for the operation of street cars is given through an ordinance containing the terms and conditions upon which the consent is based—such an ordinance being the franchise under which the railway company operates in the city. A franchise, however, must be accepted by the company before it becomes binding, and when so accepted its provisions have the obligatory force of the terms of a contract

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between the city and the company. If the right to run over the bridge be not covered by any of the provisions in the various franchises under which the defendant railway company is operating in Richmond, it not only follows that the company has no authority to run its cars over the bridge, but it seems to me it also necessarily follows that the company cannot be compelled to do so which would result in quite an anomalous condition.

"In other words, if the original franchises do not embrace this right and the corresponding duty, then it is beyond the power of either the city or the railroad company to add to either the privileges or the obligations of the company without a new franchise or contract between them. If the use of the bridge, as of any other street, comes within the terms of the franchises granted to the company, then the city cannot lessen the privileges or add to the obligations of the company without its consent. And it seems to me that this is what the city has attempted to do. I do not think the provision in the act incorporating the company in 1900, nor the amendment to the charter of the city in 1908, affect the relations between the city and the defendant company arising out of the various franchise ordinances governing the operation of the company, all of which—relevant to the question here—were in existence at the time those legislative enactments became effective.

"Those statutory provisions do, however, exhibit a careful protection of the interests of the city as a municipal corporation against any possible claim of the railway company that it could cross the public bridge of the city after it was opened as a public highway, without being subject to the obligations and duties imposed upon it under the franchises and to the payment to the city of the compensation agreed upon in the franchises for operating its cars in the public highways of Richmond generally. The railway company cannot contend that the bridge is not a part

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of a public street, and that hence the roadway of the bridge is not within the obligations undertaken by it in its franchises.

"If the bridge as a part of the public street is within the franchises of the railway company, the city can compel the company to run its cars over it, and can force it to comply with the provisions of its franchises—such as the agreement on the part of the company to construct, or pay for the construction of, the tracks and necessary accessories, to keep in repair the paved roadway between the tracks and two feet on each side, and to pay to the city the stipulated percentage on its increased revenue.

"Upon consideration of the franchise ordinances, under which the defendant company is operating, of all the evidence, the statutes bearing upon the questions presented, and of the argument of counsel and authorities cited, my conclusion is that the right of the company to continuous operation of its street car system south on Fourteenth street across the bridge and on Hull street is embraced within the terms of its franchise and subject to the obligations undertaken by it therein, and that the city cannot, without the consent of the company, impose upon the company the payment of any compensation, for its crossing of the bridge in the continuous route mentioned, in addition to the obligations and payments agreed to be performed and made by the company in its franchises.

"Judgment may therefore be entered for the defendant."

The judgment is affirmed.

Affirmed.

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Syllabus.

Wytheville.

COLONA AND OTHERS v. PARKSLEY NATIONAL BANK AND OTHERS.

June 14, 1917.

Absent, Burks, J.*

1. BILLS AND NOTES—*Endorsers—Evidence of Agreement Among Endorsers.*—A note was signed by a Farmers Mutual Exchange and appellants. Appellants testified that they signed the note with the understanding that none of them should be liable until it was brought back to them for their endorsement, and that it was to be entirely optional with them to place their names on it or not, as they might finally prefer. This testimony was objected to by the appellee, a bank, the holder of the note in due course, who under the evidence was warranted in treating appellants as endorsers.

   Held: The objection was well taken, as a holder of the note in due course could not be affected by such an understanding.

2. BILLS AND NOTES—*Endorsers—Place of Signature.*—The endorsement, as its derivation and meaning would indicate, is generally made by writing the transferer's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name. The position of the signature of an endorser upon a negotiable note is not in itself conclusive of the purpose of the signature. This is expressly recognized in section 2841-a, sub-section 17, clause 6, Code of 1904, which provides that where a signature is so placed upon an instrument that it is not clear in what capacity the person signing the same intended to sign, he is to be deemed as endorser. Undoubtedly, the names of endorsers usually appear on the back of the paper, but they may appear elsewhere without offending against the regularity required by the negotiable instruments law.

3. BILLS AND NOTES—*Regularity.*—Appellants were members of a Farmers Mutual Exchange. Anticipating that the approaching crop season would call for money with which to handle the crops of its members, a committee was appointed to solicit

*Case submitted before Judge Burks took his seat.

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endorsers for a loan. A note was prepared and sent out from the office of the Exchange. The body of the note and the signature of the Exchange appeared in type; then followed the names of twenty individual members (appellants), some immediately under the signature of the maker and some in another column to the left. It was contended that the note showed upon its face that it was invalid because it appeared to be signed by the Exchange and appellants as joint makers, payable to the order of themselves and not endorsed by them.

Held: That the substance and essence of the transaction as a whole did not, as against the bank, the holder in due course, justify this contention. The appellants manifestly did not at any time mean to become bound otherwise than as endorsers.

4. BILLS AND NOTES—*Liability of Maker.*—Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than those who purchase such paper in due course of commercial transactions.

5. BILLS AND NOTES—*Endorsement—Separate Paper.*—Where the maker of a note forwarded it to a bank accompanied by a letter, in which it was stated that the maker did assign and deposit the note as collateral security to secure the bank against any loss by overdraft of the maker, the signature of the maker to the letter of assignment was a sufficient endorsement under Code of 1904, section 2841-a, sub-section 31, which provides: "The endorsement must be written on the instrument itself or upon a paper attached thereto."

6. BILLS AND NOTES—*Assignment as Collateral—Holder in Due Course.*—The fact that the note was assigned as collateral security did not make the transfer any the less effective. It is settled in Virginia that such a transfer constitutes the transferee a holder in due course.

7. BILLS AND NOTES—*Assignment as Collateral—Deposit.*—Subsequent to the assignment of the note as security for overdrafts, the maker gave the bank written instructions to place the note to its credit.

Held: That this in no way invalidated the endorsement previously made by the assignment. The original endorsement completed the title of the bank as a *bona fide* holder of the note, and it was perfectly competent for the maker and the bank to thereafter agree to change the original purpose for which the transfer was made.

8. BILLS AND NOTES—*Negotiation of Demand Note—Reasonable Time.*—Code of 1904, section 2841-a, sub-section 53, provides that "when an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder

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is not deemed a holder in due course." What is a reasonable time for any purpose depends always upon the facts of the particular case. In the case at bar, a note dated August 24, 1911, payable on demand, was not discounted until October 31, 1911. The note was given in anticipation of its use to raise money for the purpose of handling the season's crops, when and as such use might be necessary.

Held: That there was no unreasonable delay in negotiating the note.

9. DOCUMENTARY EVIDENCE—*Bills and Notes—Action Against Endorsers.*—The minutes of the meetings of the board of directors of a Farmers Exchange, and copies of correspondence obtained from its files, relating directly or indirectly to the note in question, were admissible in an action against the endorsers, all of whom were either stockholders or directors of the Exchange.

10. CONFESSION OF JUDGMENT—*Warrant of Attorney.*—A warrant of attorney contained in a note did not designate the person in whose favor the judgment was to be confessed.

Held: A confession of judgment by an attorney under this warrant in favor of a bank, the holder of the note in due course, was valid, it appearing from the record and otherwise that before the judgment was taken the appellants all knew that the bank had the note, was looking to them for payment and had been notified by one of the endorsers to sue on the note.

Appeal from a decree of the Circuit Court of Accomac county. Decree for defendants. Complainants appeal.

Affirmed.

The opinion states the case.

S. J. Turlington and *J. L. Jeffries,* for the appellants.

Roy D. White, Stuart K. Powell and *O. F. Mears,* for the appellees.

KELLY, J., delivered the opinion of the court.

This suit in equity was brought by G. W. Colona and nineteen others to cancel a judgment obtained against them

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by confession, in favor of the Parksley National Bank. The lower court having heard the cause upon the bill and depositions and exhibits, entered the decree appealed from sustaining the validity of the judgment assailed and dismissing the bill.

The evidence is voluminous and upon some material points it is conflicting. We have endeavored, by a careful examination of the record, fairly to determine the essential facts, and these will appear in the course of this discussion.

The appellants, complainants below, were members of the Farmers Mutual Exchange of the Eastern Shore of Virginia, an incorporated association engaged in buying and selling potatoes in the counties of Accomac and Northampton. Anticipating that the approaching crop season in those counties would call for money with which to handle the crops of its members, the directors of the Exchange met on the 14th of June, 1911, and determined upon a general course of action, which found definite expression in the following extract from the minutes of that meeting: "A motion was made to appoint a committee to solicit endorsers for a loan, which was duly made and seconded and was carried. The chair appointed the following committee * * On motion * * the board resolved to borrow $40,000."

The plan adopted to raise this money contemplated that the Exchange should make five notes of $8,000 each, to be secured by the endorsement of the various members living in different sections of the two counties, and then to be offered to the local banks for discount. These notes were accordingly signed by the Exchange and placed in the hands of sundry members to solicit endorsers. The judgment in question was rendered upon one of these notes, which was placed in the hands of Mr. W. H. Matthews, a member of the board of directors, for the purpose of securing endorsers in the northern section of Accomac county. In stating that these notes were distributed for the purpose of secur-

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ing endorsers, we use the latter term advisedly. In the face of the record it cannot be successfully denied, and we think it is not denied, that the original plan had in view notes to be made by the Exchange and endorsed by the members.

At another meeting of the directors, held some days later, the note in question, along with three others of like amount, was turned in to the board, the records of that meeting showing that "the report of the soliciting committee for endorsers was called for and four notes of $8,000 each were returned to the secretary with endorsers, with instructions to apply for loans on same." This particular note, and perhaps the others, was upon a typewritten form on which certain blanks as well as the names of all the endorsers were subsequently filled out with pen and ink. The note is copied here in full, the italics indicating the use of pen and ink, the balance of the paper showing the original type, with the signatures appearing in the same relative position as upon the original.

"No..... Exmore, Va. *Aug. 24th* 1911.

.. *$8000.00*

Due *on demand*

On demand after date *we* promise to pay to the order of *ourselves* the sum of Eight thousand (8000) dollars at

Parksley Nat'l Bank, Parksley, Va.

value received, without offset.

"The maker and endorser each hereby waives the benefit of the homestead exemption, and all right of exemption from execution, as to the debt evidenced by this obligation, and if default be made in the payment hereof at maturity, hereby covenants to pay ten per cent. additional as collection fee; and hereby authorizes and empowers any attorney of record to confess judgment against *us* for the above sum and the costs of suit, with ten per cent. collection charges.

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And we maker and endorser each hereby waives demand, protest and notice of non-payment hereof.

FARMERS MUTUAL EXCHANGE OF EASTERN SHORE OF VA., INC.

G. W. Colona
C. C. Tindall
L. B. West
J. W. Lankford

F. A. Shield, Treas.
W. H. Matthews
W. W. Kerns,
J. A. Bundick
D. W. Barnes
W. H. Wassels
T. H. Walker
L. S. Lankford
Jno. H. Bull
his
H. R. x Chase
mark
W. T. Bundick
J. F. Matthews
F. P. Matthews
O. W. Dunton
W. H. Ewall
G. M. Fisher
E. A. Ewall."

This note came to the hands of the bank in the manner hereinafter stated, and the Exchange realized thereon the full amount. Upon the 22nd day of January, 1912, no part of the note having been paid, the bank instituted an action thereon against the Exchange and all of the appellants, and upon the same day the judgment in question was confessed

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in the clerk's office by an attorney of record. The process in this action was issued but not served, the endorsement thereon being as follows: "1912, Jan. 22—Bond and power of attorney filed and judgment confessed by Geo. L. Doughty, Jr., attorney of record, for debt, interest and costs at 11:30 a. m."

It is pertinent in this connection to state that shortly before the judgment was obtained, D. W. Barnes, one of the appellants, gave to the bank a notice in the following form: "As the holder of a certain negotiable promissory note, made and executed by the Farmers' Mutual Exchange, Incorporated, for the principal sum of eight thousand dollars ($8,000.00), payable on demand, which bears my endorsement, and upon which a right of action has accrued, you are hereby required forthwith to institute suit thereon for the collection of said note. This notice is given in accordance with section 2890 of the Code of Virginia, by me as an endorser on said note as aforesaid.

"Given under my hand this the 16th day of December, A. D. 1911."

Subsequent to the giving of this notice and before the judgment was taken, all of the appellants were called by the secretary of the Exchange to meet at the bank to consider some action in regard to the notes. An effort was at that time made to bring about some arrangement by which Barnes could be allowed to pay his share of the note and be released. This effort failed. Appellants claim that they knew nothing of the judgment until some time in the following summer. They did not bring the present suit until March, 1914, which was more than two years after the date of the judgment.

We may now take up the several grounds upon which the appellants ask us to reverse the decree under review, developing such further facts as may be important as we proceed.

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A principal contention is that the note shows upon its face that it was invalid because it apeared to be signed by the Exchange and the appellants as joint makers, payable to the order of themselves and not endorsed by them. The substance and essence of the transaction as a whole does not, as against the bank, justify this contention. The appellants manifestly did not intend, at any time, to become bound otherwise than as endorsers. The conclusion is irresistible from the record that the general scheme was for the Exchange to make all of these notes as principal and have them secured by individual endorsement. It is quite true that the appellants testify most emphatically that they signed the note with the understanding that none of them should be liable until it was brought back to them for their endorsement, and that it was to be entirely optional with them to place their names on it or not, as they might finally prefer. Their testimony offered in proof of this remarkable and altogether unique arrangement was objected to by counsel for the bank, and we think the objection was well taken, because as we shall see, the bank was warranted in treating them as endorsers and, becoming the holder of the note in due course, it could not be affected by the understanding here set up as a defense.

After the note was returned to the Exchange, as above detailed, it was forwarded to the bank with a paper attached thereto in the following words (Italics added):

"Exmore, Va.

"August 24th, 1911:

"To secure the Parksley National Bank of Parksley, Va., against any loss through or by the overdraft the said bank was allowing this Farmers' Mutual Exchange of the Eastern Shore of Virginia, Inc., of Exmore, Va., *we do hereby assign to and deposit with the said bank, the note for eight thousand dollars, which is executed by ourselves to our order and bears the endorsements of G. W. Colona, C. C.*

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Tyndall, L. B. West, J. W. Lankford, W. H. Matthews, W. W. Kerns and fourteen others, the said note being dated this day and made payable on demand, and the said note is appended hereto, as collateral security against such loss by the said bank. It is understood that when our account with the said Parksley National Bank is satisfactorily closed that this security is to again pass into our possession from the said bank and the receipt we hold for same be surrendered to the said bank.

"FARMERS' MUTUAL EXCHANGE OF
EASTERN SHORE OF VA., INC.
F. A. SHIELD, Secretary and Treasurer."

The letter to the bank from the Exchange which accompanied the note and assignment stated that the note was intended as collateral to secure an overdraft, but later in the same day another letter requested, in effect, that the paper be discounted and placed to the credit of the Exchange. This was done, and the fact that the Exchange got the full benefit of the proceeds is not questioned.

Under section 2841-a of the Code of Virginia, sub-section 52, "A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face. 2. That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The only condition of the section just quoted under which there can be any plausible question made regarding the situation of the bank as a holder in due course, is the first, namely, that the note must be complete and regular upon its face. It is urged upon us that the position of the signa-

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tures shows that the appellants were joint makers with the Exchange, and, therefore, that the note appeared to be incomplete without their endorsement. This contention ignores three important considerations: First, that appellants themselves never at any time contemplated becoming bound otherwise than as endorsers; second, that the Exchange, which was known to be, in a measure, representing them, and which they had placed in a position to negotiate the note, described them in the assignment as endorsers; and, third, that the position of the signature of an endorser upon a negotiable note is not in itself conclusive of the purpose of the signature. The latter proposition is expressly recognized in section 2841-a, sub-section 17, clause 6, which provides that where a signature is so placed upon an instrument that it is not clear in what capacity the person signing the same intended to sign, he is to be deemed as endorser. Undoubtedly, the names of endorsers usually appear on the back of the paper, but they may appear elsewhere without offending against the regularity required by the negotiable instruments law.

"The endoresement, as its derivation and meaning would indicate, is generally made by writing the transferer's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name. As said by Lord Campbell, C. J.: 'It is quite immaterial whether the endorsement be written on the back of the instrument or on the face.' Where the payee's name was endorsed in the usual place on the back of the note, and another endorsed it, writing his name at the other end with his signature reversed, it was considered irregular, but valid and in the course of business." 1 Daniel Neg. Instr. (6th ed.) sec. 688. See also Bigelow on Bills & Notes, (2d ed.) p. 83; *Shain* v. *Sullivan*, 106 Cal. 208, 210, 39 Pac. 606, 7 Cyc. 793; 8 Corpus Juris. 350, 351.

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Here was a note evidently prepared and sent out from the office of the Exchange, with the body of the note and signature of the Exchange appearing in type; then followed the names of twenty individual members, some immediately under the signature of the maker and some in another column to the left. The bank knew of the original plan under which the note was to be issued, and it was natural, therefore, that when the cashier examined the note, as he says he did, most carefully, he should have treated it as having been made by the corporation and endorsed by the individuals. He testifies that from the manner in which the names were written thereon, taken with the language of the annexed assignment and his knowledge that the notes of this series had been carried around for the endorsements, he construed the words "to the order of ourselves" to refer to the Exchange, and regarded the individuals as endorsers. This conclusion was warranted by the facts and the form of the note when viewed in the light of the wise and just rule that, "those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than those who purchase such paper in due course of commercial transactions." *Fleshman* v. *Bibb*, 118 Va. 582, 88 S. E. 64; *Vaughan* v. *Johnson*, 20 Idaho 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816, 818.

It is insisted, however, that if the Exchange was in fact the maker and appellants merely endorsers, there was never any valid endorsement of the note by the Exchange itself. There is, we think, no merit in this contention. The name of the Exchange appears only once on the note, but its signature to the assignment attached thereto was a sufficient endorsement. "The endorsement must be written on the instrument itself or upon a paper attached thereto." Code, sec. 2841-a, sub-sec. 31.

In the case of *Thorpe* v. *Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1012, the court,

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after referring to several Wisconsin cases, says: "In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby 'assigned and transferred' to the holder of the bond as security for the payment of the bond, there being no endorsement on the note itself; and this was held an endorsement within the law merchant." See also 1 Daniel Neg. Inst. (6th ed.) section 688-c and note; 3 R. C. L., p. 969, section 178; *Herring* v. *Woodhull,* 29 Ill. 92, 81 Am. Dec. 296, 298.

The fact that the note was assigned as collateral security did not make the transfer any the less effective. It is settled in Virginia that such a transfer constitutes the transferree a holder in due course. *Anderson* v. *Union Bank,* 117 Va. 1, 5, 83 S. E. 1080.

Nor do we think the fact that subsequent to the assignment of the note as security for the overdraft the Exchange gave the bank written instructions to place the note to the credit of the former in any way invalidated the endorsement previously made by the assignment. The original endorsement completed the title of the bank as a *bona fide* holder of the note, and it was perfectly competent for the Exchange and the bank to thereafter agree to change the original purpose for which the transfer was made. So far as the appellants are concerned, they became bound by their signatures before there was any negotiation of the paper, and its use by the Exchange, either as collateral security, or by way of discount and credit, was directly in furtherance of the purpose for which the note was made, was in keeping with the course of commercial business, and could not operate to the prejudice of appellants in any such way as to give them the right to complain.

We have not overlooked the contention of the appellants that a Mr. Chandler, who was the president of the bank and also the general manager of the Exchange, had notice of the

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alleged arrangement and understanding by virtue of which appellants claim they were not to be bound without their re-endorsement; but in our opinion the evidence is insufficient to sustain that contention. The evidence tending to show such notice on the part of Mr. Chandler is exceedingly meagre, and on the other hand his testimony is positive and emphatic to the effect that he was not aware of any defect or infirmity in the paper.

It is further insisted that as the note was dated August 24, 1911, payable on demand, and not discounted until October 31, 1911, the bank is precluded from claiming to be a holder in due course by virtue of sub-section 53 of section 2841-a of the Code, which provides that, "when an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course." What is a reasonable time for any purpose depends always upon the facts of the particular case. This familiar proposition is directly recognized by sub-section 193 of section 2841-a, wherein it is declared that, "in determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case." In the present instance we have no difficulty in deciding that there was no unreasonable delay in negotiating the note. All of the notes of the series were given in anticipation of their use by the Exchange to raise money for the purpose of handling the season's crops, when and as such use might be necessary.

Another ground of error relied upon is the action of the court in admitting in evidence the minutes of the meetings of the board of directors of the Exchange, and copies of certain correspondence obtained from its files, relating either directly or indirectly to the note in question. Without going into the particulars of each item of proof here chal-

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lenged, we deem it sufficient to say that they were all germane to the controversy and proper evidence against the appellants. Five of the appellants were directors; four of these were present at the first and five at the second of the two meetings from the minutes of which the extracts in question were taken. Every one of appellants was either a stockholder or director of the Exchange. W. H. Matthews, who was mainly instrumental in procuring the endorsements and who delivered the note with the signatures of the individuals to the Exchange to be held until its use was needed, was himself one of the directors. There is, we think, no just ground upon which the correspondence and minutes objected to could have been excluded.

We pass now to the consideration of another assignment of error upon which the appellants apparently place great reliance. It is claimed that the judgment on the note was void because the attorney who confessed it had no power to do so. The argument is that the warrant of attorney contained in the note did not designate the person in whose favor the judgment was to be confessed.

It is generally held that a warrant of attorney must be strictly construed. The case of *Spencer* v. *Emerine*, 46 Ohio St. 433, 21 N. E. 866, 15 Am. St. Rep. 634, cited by appellants, carried this rule to the extent claimed for it in the instant case: and other authorities referred to by them, while not so directly in point, tend strongly to sustain their contention. We are not disposed, however, to go as far in applying the rule of strict construction to warrants of attorney as these authorities have gone. The question is an open one in this jurisdiction. Limiting our decision to the facts of this particular case, we are of opinion that the court did not err in giving effect to the judgment by confession. Such judgments, in general, are not contrary to the policy of this State (*Valley of Virginia Ins. Co.* v. *Barley's Admr.*, 16 Gratt. [57 Va.] 363), nor to

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the terms of the negotiable instruments law (Code, section 2841-a, sub-sec. 5). Having decided that the bank was the holder of this note in due course, and finding from the allegations in the bill and otherwise from the record that before the judgment was taken the appellants all knew that the bank had the note, was looking to them for payment and had been notified by one of the endorsers to sue on the note, we are of opinion that the warrant of attorney, as used in this case, was a just and lawful exercise of the power conferred by the note.

In the case of *Fritz* v. *Horten* (Pa. 1914), 243 Pa. 187, 90 Atl. 58, the court used the following language in the course of its opinion, which we think is applicable to the case at bar: "No question was raised in the common pleas or here as to the form of the action. But it is contended that the form is a mere fiction in law and that Ella M. Fitz was the real plaintiff. If regarded in that light, she was the owner of a bond made expressly payable to an assignee and which contained a warrant of attorney not limited to a confession of judgment in favor of the obligee, but general in its terms. The warrant was given in aid of the collection of the debt, and, being unrestricted, the only reasonable implication is that it was meant to be as broad as the obligation of the bond, and extended to the owner thereof by assignment. This construction is not in violation of the rule that in entering judgment on a warrant of attorney the authority given by it must be strictly pursued."

It follows from what has been said that in our opinion the judgment was valid, and it is, therefore, not necessary to consider the effect upon the rights of the appellants of their delay of nearly two years after they knew of the fact that the judgment had been taken.

There is no error in the decree complained of, and it is affirmed.

Affirmed.

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Wytheville.

COMMONWEALTH v. THE FERRIES COMPANY.

June 14, 1917.

Absent, Burks, J.*

1. TAXATION—*Recovery Back of Taxes Voluntarily Paid.*—The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment. The rule, of course, does not apply where repayment is made pursuant to a valid statute.
2. TAXATION—*Constitutional Law—Refund of Taxes.*—In the absence of constitutional limitation upon its powers, the right of the legislature to refund taxes paid, even though voluntarily paid, is unquestioned. Although the legislature may not be compellable to refund an amount so paid, it may do so without compulsion. Such acts are not infrequent; and it is settled law that a valid appropriation may be made to discharge a merely moral obligation.
3. STATE—*Action Against—Jurisdiction.*—A State can only be sued by a citizen upon such terms as it is pleased to prescribe, and the Circuit Court of the city of Richmond alone has been given jurisdiction of suits for injunctions involving State taxes.
4. STATUTES—*Preamble.*—The preamble to a statute is no part of it and cannot enlarge or confer powers or control the words of the act unless they are doubtful or ambiguous. Not being an essential part of the statute, it may be altogether omitted.
5. TAXATION—*Constitutional Law—Special or Private Law—Refunding Taxes.*—Section 63, clause 9, of the Constitution of Virginia, prohibits the legislature from refunding by private act money lawfully paid into the treasury. But the Constitution imposes no limitation upon the power of the legislature to refund money unlawfully paid or collected. The fact that the Constitution in terms prohibits the one and is silent as to the other, creates a strong presumption that it was not intended to trench upon the absolute control of the legislature in its management of the business of the State with respect to refunding money unlawfully paid into the treasury.

*Submitted before Judge Burks took his seat.

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6. TAXATION—*Constitutional Law—Special or Private Law—Refunding Taxes.*—Nor does the Constitution require that the illegality of the tax shall be judicially determined before the legislature may act.
7. CONSTITUTIONAL LAW—*Separation of Legislative, Executive and Judicial Power.*—In all cases involving questions of constitutional restrictions the legislature necessarily, in the first instance, must determine for itself whether a contemplated act is constitutional, though ultimately it may become a judicial question to be decided by the courts. Nor is this primary determination by the legislature as to the validity of an act violative of the fundamental principle of republican government that legislative, executive and judicial power ought to be kept distinct and separate, except in so far as the action of one is intended to constitute a check upon the action of the others in the sense of keeping them within proper bounds.
8. STATE—*Appropriation Acts.*—The legislature, in the matter of making appropriations, acts in its administrative rather than in its legislative capacity.
9. TAXATION—*Refunding Taxes—Special and Private Law.*—The Constitution of Virginia, section 63, clause 8, forbids special laws remitting or releasing any obligation or liability of any person, corporation or association to the State or to any political sub-division. As no one rests under any obligation or liability to pay taxes on property expressly exempted by the Constitution, this provision has no application to a statute refunding such tax. Nor has section 63, clause 18, of the Constitution, which prohibits granting to any private corporation, association or individual any special, or exclusive right, privilege or immunity, any application to such an act.
10. TAXATION—*Special Laws—Refunding Tax.*—Section 64 of the Constitution provides: "* * * no private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual." And sections 567 and 568, Code of 1904, furnish remedies for the correction of erroneous assessment of taxes. Notwithstanding these provisions, the legislature is not deprived of the power of refunding by special act taxes illegally collected. "The claim is of a class that peculiarly falls within the administrative department of the legislature and it would be unwise and inconvenient by a too narrow construction of section 64, to deprive the legislature of its exercise of a power which existed long before the adoption of the present Constitution in which this provision appears for the first time."

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11. CONSTITUTIONAL LAW—*Appropriation Act.*—Section 186 of the Constitution provides that, "No money shall be paid out of the treasury except in pursuance of appropriations made by law." Under this provision no particular form of appropriation is prescribed, and an act which directs the Auditor of Public Accounts to draw his warrant for a definite sum in favor of the claimant on the treasurer of a city, complies with all the requirements of a valid appropriation.

12. STATE—*Appropriation Acts.*—The use of technical words in a statute making an appropriation is not necessary.

Error to an order of the Circuit Court of the city of Richmond, awarding a peremptory mandamus.

Affirmed.

The opinion states the case.

John Garland Pollard, Attorney-General, for the Commonwealth.

R. R. Hicks, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This is a mandamus proceeding instituted by The Ferries Company of the city of Norfolk to compel the Auditor of Public Accounts to draw his warrant for the sum of $992.40 in its favor on the treasurer of that city pursuant to an act of the General Assembly approved March 23, 1912. Acts 1912, p. 684. To an order of the trial court awarding a peremptory mandamus as prayed for, this writ of error was granted.

The defense rests solely upon the allegation that the act is unconstitutional. It is contended:

1. That it violates section 63 of the Constitution, which provides that "The General Assembly shall not enact any local, special or private law in the following cases: * * *

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"9. Refunding money lawfully paid into the treasury of the State or the treasury of any political subdivision thereof."

The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment. *Virginia Brewing Co.* v. *Commonwealth,* 113 Va. 145, 73 S. E. 454. That principle, of course, does not apply where repayment is made pursuant to a valid statute.

It is true that the act of 1912 is a special or private act, yet that circumstance, standing alone, does not affect its constitutionality. To render it obnoxious to clause 9, it must provide for refunding money *lawfully, not unlawfully,* paid into the treasury. In the absence of constitutional limitation upon its powers, the right of the legislature to refund taxes paid, even though voluntarily paid, is unquestioned. Although the legislature may not be compellable to refund an amount so paid, it may do so without compulsion. Such acts are not infrequent; and it is settled law that a valid appropriation may be made to discharge a merely moral obligation. *United States* v. *Realty Co.,* 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215; *Civic Federation* v. *Salt Lake County,* 22 Utah 6, 61 Pac. 222.

The preamble of the act recites that the taxes had been adjudged by the Circuit Court of Norfolk to be illegal, and the property of The Ferries Company non-assessable for State taxation. The point is well made that this was a suit for an injunction involving State taxes, but that the State was not a party; and, moreover, that such a suit could only be brought in the Circuit Court of the city of Richmond. A State can only be sued by a citizen upon such terms as it is pleased to prescribe, and the Circuit Court of the city of Richmond alone has been given jurisdiction in that class of cases. *Johnson* v. *Hampton Institute,* 105 Va. 319, 34 S. E. 31. Nevertheless, the fact that the preamble of the act is not

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true in law is immaterial. "The preamble to a statute is no part of it and cannot enlarge or confer powers or control the words of the act unless they are doubtful or ambiguous." *Yazoo R. R.* v. *Thomas,* 132 U. S. 174, 10 Sup. Ct. 68, 33 L. Ed. 302. Not being an essential part of the statute they may be altogether omitted.

By the act of 1912, the legislature has seen fit to direct the refunding of the sum paid on account of these taxes; and, in the absence of constitutional restraint, it was acting within its powers. Subject only to such restriction the power of the legislature over State funds is plenary. 36 Cyc. 882. Clause 9, as we have seen, only prohibits the legislature from refunding by private act money *lawfully* paid into the treasury. The Constitution imposes no limitation upon its power to refund money *unlawfully* paid or collected. The fact that the Constitution in terms prohibits the one and is silent as to the other, creates a strong presumption that it was not intended to trench upon the absolute control of the legislature in its management of the business of the State with respect to refunding money unlawfully paid into the treasury.

In this instance it is not denied that the tax was illegally levied, but the assertion is that the fact of its illegality had not been judicially determined. That circumstance is wholly immaterial. The Constitution does not require judicial ascertainment of an undisputed fact as a precedent condition to legislative action in such case. In all cases involving questions of constitutional restrictions the legislature necessarily, in the first instance, must determine for itself whether a contemplated act is constitutional, though ultimately it may become a judicial question to be decided by the courts. Nor is this primary determination by the legislature as to the validity of an act violative of the fundamental principle of republican government that legislative, executive and judicial power ought to be kept distinct and sep-

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arate, except in so far as the action of one is intended to constitute a check upon the action of the others in the sense of keeping them within proper bounds.

In the present case the foregoing principle has been applied with respect to the act of 1912. Therefore, we conclude that the legislature has not transcended its power in deciding for itself, in the first instance, that these taxes were illegally collected, but in so doing it was exercising a usual and necessary legislative function which is subject only to final review and determination by the courts. 36 Cyc. 883, 885, 886.

It may also be observed in this connection, that the legislature, in the matter of making appropriations, acts in its administrative rather than in its legislative capacity. Yet, if there was any merit in the point stressed by the plaintiff in error that a prior adjudication by a court that The Ferries Company was not taxable was necessary to warrant the act of 1912, the contention is answered by the cases of *Black* v. *Sherwood*, 84 Va. 906, 6 S. E. 484, and *Norfolk, &c. Co.* v. *City of Norfolk*, 105 Va. 139, 52 S. E. 851; holding that the property of the company was non-taxable.

2. The second contention is, that the act violates section 63, clause 8, of the Constitution prohibiting the enactment of special laws, "Remitting, releasing, postponing or diminishing any obligation or liability of any person, corporation or association to the State or to any political sub-division thereof." This contention is answered by the facts which plainly show that the act of 1912 violates none of the prohibitions above enumerated. No one can rest under obligation or liability to pay taxes on property expressly exempted by the Constitution.

3. The third contention is, that the act violates section 63, clause 18, of the Constitution, in "granting to any private corporation, association or individual any special, or exclusive right, privilege or immunity." Again, the answer

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is that there is no evidence upon which to ground this objection.

4. The fourth contention is, that the act violates the provision of section 64, that "* * no private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual." The argument urged under this assignment is that The Ferries Company should have been remitted to the remedies furnished by sections 567 and 568 of the Code, for the correction of erroneous assessment of taxes.

Considered in light of the long established exercise by the legislature of the purely administrative function of refunding to the citizen unlawful exactions, we do not think the act of 1912 violates this section of the Constitution. The claim is of a class that peculiarly falls within the administrative department of the legislature and it would be unwise and inconvenient by a too narrow construction of section 64, to deprive the legislature of its exercise of a power which existed long before the adoption of the present Constitution in which this provision appears for the first time. *Ragsdale* v. *Danville*, 116 Va. 484, 82 S. E. 77, and cases cited.

5. The fifth and last contention is that the act violates section 186 of the Constitution providing that, "No money shall be paid out of the treasury except in pursuance of appropriations made by law."

The act of 1912 is a valid appropriation act within the meaning of section 186. No particular form of appropriation is prescribed, and the act directs the Auditor of Public Accounts to draw his warrant for a definite sum on the treasurer of the city of Norfolk in favor of The Ferries Company, and that complies with all the requirements of a valid appropriation. Indeed, that is the usual form of an appropriation bill in this State when special relief to indi-

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viduals is granted. See Acts 1906, ch. 14; Acts 1908, ch. 603; Acts 1901-2, ch. 194, 656, and ch. 691.

That the use of technical words in a statute making an appropriation is not necessary, see *Campbell* v. *Board,* 115 Ind. 591, 18 N. E. 33; *Henderson* v. *Board,* 129 Ind. 92, 28 N. E. 127, 13 L. R. A. 169, and 36 Cyc. 892.

We are of opinion that the order of the Circuit Court of the city of Richmond is without error and must be affirmed.

Affirmed.

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Syllabus.

Wytheville.

COMMONWEATH AND OTHERS v. THE UNITED CIGARETTE MACHINE COMPANY, LIMITED.

June 14, 1917.

Absent, Burks, J.*

1. TAXATION—*Constitutional Law—Validity of Limitation on Time within which Omitted Taxes May be Assessed.*—Code of 1904, section 508, as amended by act of March 22, 1916, chapter 491, section 1, sub-section 2, page 826, providing that, "No municipal, county or district tax shall be levied or collected on any assessment of intangible personal property, money or incomes for taxes alleged to have been omitted from the assessments for the years prior to nineteen hundred and twelve," is constitutional. This amendment to section 508 was intended as a statute of repose, and while it may result in releasing some just obligations and in permitting some intentional wrongdoers to escape taxation which ought to have been imposed upon them, the purpose of the amendment was a just one and the result, in the main, is for the public good.
2. CONSTITUTIONAL LAW—*Power of Legislature—General Rule as to Validity of Statutes.*—The legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication. We look to the Constitution of the State, not for grants of power, but for limitations. When the prohibition is not found in the language of that instrument, or in its frame-work and general arrangement, there is no solid ground to pronounce the enactment void. The infractions must be clear and palpable.
3. EX POST FACTO LAWS—*Definition.—Ex post facto* laws relate to criminal proceedings which inflict punishments or forfeitures and not to civil proceedings which affect private rights retrospectively.
4. CONSTITUTIONAL LAW—*Retrospective Law.*—There are no consti-

*Submitted before Judge Burks took his seat.

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tutional inhibitions against the passage of retrospective laws as such. They are not favored by the courts, but to be invalid they must impair the obligation of contracts, destroy vested rights or fall within the definition of *ex post facto* laws.

5. CONSTITUTIONAL LAW—*Due Process of Law—Vested Rights—Taxation.*—The act of March 22, 1916, referred to in the first headnote, is not unconstitutional as depriving the political divisions of the State of property without due process of law. The incipient right to assess omitted property, as conferred by section 508, Code 1904, does not fall within the meaning of a vested property right as recognized by the authorities. The mere existence of a general law which might have been availed of to reduce to a state of property an incomplete right, affords to those who have not perfected their rights thereunder no ground for complaint against a change of the law. There must be something more than a mere expectation based upon anticipation of the continuance of present general laws.

6. CONSTITUTIONAL LAW—*Impairment of Obligation of Contracts—Taxation.*—Nor is the act of March 22, 1916, invalid as impairing the obligation of contracts.

7. TAXATION—*Constitutional Law—Local, Special or Private Laws.*—The act is not a 'local, special or private law," but applies alike to all persons, both natural and artificial, and to all municipalities, counties and districts situated similarly to those involved in this case; and it is not, therefore, in contravention of section 63 of the Constitution of Virginia against the enactment of local, special and private laws. The fact that it happens to redound to the special benefit of certain persons and against the interests of certain localities does not make it a special or local law within the meaning of the Constitution.

8. TAXATION—*Constitutional Law—Section 64 of the Virginia Constitution.*—The act does not violate section 64 of the Virginia Constitution against the surrender or suspension, by either general or special law, of the right and power of the State or any political sub-division thereof to tax corporations or corporate property. It is manifest upon a reading of section 64 that the prohibition in question was intended to prevent the extension of favors and discriminations in favor of corporations as against individuals.

9. TAXATION—*Constitutional Law—Uniformity.*—The act does not violate section 168 of the Constitution.

10. TAXATION—*Constitutional Law—Exemptions.*—The act is not an exemption from taxation within the meaning of section 183 of the Constitution.

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Syllabus.

11. TAXATION—*Constitutional Law—Section 174 of the Constitution.*—Section 174 of the Constitution providing that the failure to assess property for taxation shall not defeat a subsequent assessment for and collection of taxes for any preceding years, cannot properly be construed to mean that the legislature may not validly impose a time limit within which county or district assessments for back taxes must be made. The failure to assess for taxation cannot defeat a subsequent assessment for county and district taxation, but the subsequent assessment must be made in the manner and within the time prescribed by law.

12. TAXATION—*Retrospective Laws—Omitted Property—Interest.*—Statutes will not be given a retrospective effect except in cases where such effect was plainly intended by the legislature. This rule applies peculiarly to the laws relating to assessment of property which has been omitted from taxation, the rule being that such assessments are to be made according to the law in force at the time the assessment should have been made. Consequently, where a statute forbade the charge of interest on taxes omitted through no fault of the taxpayer, was subsequently amended allowing the addition of interest in all cases of omitted taxes, the amendment should not be construed to apply retrospectively.

13. TAXATION—*Omitted Property—Interest.*—Where the evidence was sufficient to warrant the court in finding that the failure of the defendant in error to make a proper return was due to an honest belief that its intangible property was not subject to taxation because it was a foreign corporation, the court was right in holding that no interest should be charged on omitted taxes, under section 508, Code of 1904, providing that where the omission was due to "no fault of the person charged with the tax no interest shall be charged."

14. PRESUMPTION AND BURDEN OF PROOF—*Presumption of Knowledge of the Law—Taxation.*—In a sense, and as a general rule, it is true that every man is presumed to know the law, and that ignorance of it furnishes no excuse; but when the legislature provided for the remission of interest on taxes omitted from assessment through "no fault" of the taxpayer, it must have meant to recognize a difference between omissions due to wilful and conscious wrongdoing and cases due to honest misapprehension and misconstruction of the tax laws.

Error to a judgment of the Circuit Court of Campbell county, on a motion to correct an erroneous assessment of

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taxes. Judgment for the petitioner. Defendant assigns error.

Affirmed.

The opinion states the case.

John Garland Pollard, Attorney-General, Volney E. Howard and *A. H. Light,* for the plaintiffs in error.

John G. Haythe, Wyndham R. Meredith, A. H. Burroughs and *F. S. Kirkpatrick,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

This writ of error is a continuation, under some variety of circumstance and contention, of the litigation in which an opinion was handed down by this court at Staunton, in September, 1916. See *Commonwealth* v. *United Cigarette Machine Co.,* 119 Va. 447, 89 S. E. 935. After the cause was remanded to the circuit court for further proceedings to be had therein in accordance with that opinion, it was again heard upon the former record and upon certain additions thereto which will sufficiently appear in the course of the present discussion.

Broadly stated, the former proceeding involved the question of taxation, for State, county and district purposes, of capital omitted by the defendant in error from its returns to the commissioner of the revenue for the years 1908 to 1913 inclusive; while the present one involves, partly upon the same and partly upon different issues, this taxation for those years, and also, by virtue of the supplements to the original record, for the years 1914 and 1915.

The former writ of error was matured, argued and submitted before the passage of the act of March 22, 1916,

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(Acts 1916, ch. 491, p. 826), which amended section 508 of the Code, in part as follows:

"(2) No municipal, county or district tax shall be levied or collected on any assessment of intangible personal property, money or incomes for taxes alleged to have been omitted from the assessments for the years prior to nineteen hundred and twelve."

At the second hearing in the circuit court, when the judgment now under review was rendered, the defendant in error invoked, and the court applied, the limitation prescribed in the above amendment. This action of the court, which constitutes the basis of the first assignment of error and presents what we regard as the dominant question upon this appeal, is evidenced by the following extract from the judgment: "The court is further of opinion that clause 2 of section 508 of the Code of Virginia, as amended by act of assembly of Virginia approved March 22, 1916, (Acts of Assembly 1916, pages 826-828) is valid and its provisions are applicable to this case, and that county and district taxes should not be levied or collected for said years prior to 1912, but that such taxes should be levied and collected for said years 1912 and 1913, respectively, with five per cent. penalty thereon."

The correctness of this ruling is challenged by the county of Campbell and Blackwater district therein, on the ground that the amendment to the statute, clause 2 of section 508 of the Code, is unconstitutional and void; and their first proposition is, that the enactment "is retroactive, and, in its application to this case, is of the nature and effect of an *ex post facto* law."

We do not understand plaintiffs in error as contending that the amendment to the statute is, strictly speaking, an *ex post facto law*. That it is not such within the meaning of the Constitution is clear under settled and familiar rules and definitions. "*Ex post facto* laws relate to criminal pro-

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ceedings which inflict punishments or forfeitures and not to civil proceedings which affect private rights retrospectively. This doctrine has been solemnly settled by the Supreme Court in numerous cases, and is now the accepted rule of construction." Staples, J., in *Danville* v. *Pace*, 25 Gratt. (66 Va.) 1, 9, 18 Am. Rep. 663. See also 1 Min. Inst. (4th ed.) 26; 8 Cyc. 1028, and cases cited in notes 11 and 12.

It is equally true, and equally familiar law, that there are no constitutional inhibitions against the passage of retrospective laws as such. They are not favored by the courts, but to be invalid they must impair the obligation of contracts or destroy vested rights. As was said by Judge Keith for this court in a case cited by counsel for plaintiffs in error, "it cannot be denied that the legislature may, in its wisdom, pass retrospective statutes, sometimes called curative laws, subject to well-defined limitations upon its power. It cannot pass an *ex post facto* law, nor a law which impairs the obligation of a contract; and, since the adoption of the Fourteenth Amendment and the introduction into our Constitution of identical phraseology, it may be conceded that it cannot divest vested rights, because that would be to deprive a citizen of property without due process of law; but until that principle was introduced into the Constitution of the United States by the Fourteenth Amendment, the only limitation upon the power of a State with respect to retrospective laws was, that they should not impair the obligation of contracts, nor partake of the nature of *ex post facto* laws." *Whitlock* v. *Hawkins*, 105 Va. 242, 249, 53 S. E. 401, 403.

We do not perceive any ground upon which the subsection in question can be assailed as impairing the obligation of a contract, and, as we understand counsel, the real controversy is whether in its application to this case this sub-section deprives Campbell county and Blackwater district of any vested rights, and thus becomes violative of the

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constitutional provision against taking property without due process of law. We are of opinion that it does not.

This is not the case of taxes already due and collectible upon a regular and valid assessment. If it were conceded that as to taxes of this latter character, the right to collect has become a vested property right which subsequent legislation could not defeat, the concession would not influence the decision of this case. Here there had been no assessment and no levy when the act in question was passed, and the mere inchoate right given by section 508 to make the assessment was not sufficient to vest in the county and district any property in the taxes which but for the omitted assessment and levy would have been enforceable. A regular and timely assessment is a prerequisite to the right of levy and collection. The incipient right to assess omitted property, as conferred by section 508, does not fall within the meaning of a vested property right as recognized by the authorities. The mere existence of a general law which might have been availed of to reduce to a state of property an incomplete right, affords to those who have not perfected their rights thereunder no ground for complaint against a change of the law. There must be something more than a mere expectation based upon anticipation of the continuance of present general laws. 4 Words and Phrases (2d ser.), Title "Vested Rights," p. 1166; 8 Cyc. 894, note 37.

Passing now to the other constitutional objections urged against the sub-section 2, none of them appear to us as being sound. We shall deal with them very briefly.

The act assailed is not, as contended, a "local, special or private law," but applies alike to all persons, both natural and artificial, and to all municipalities, counties and districts situated similarly to those involved in this case; and it is not, therefore, in contravention of section 63 of the Constitution of Virginia against the enactment of local, special and

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private laws. The fact that it happens to redound to the special benefit of certain persons and against the interests of certain localities does not make it a special or local law within the meaning of the Constitution. *Ex parte Settle*, 114 Va. 715, 77 S. E. 496; 36 Cyc. 986.

The sub-section does not, as claimed, violate section 64 of the Virginia Constitution against the surrender or suspension, by either general or special law, of the right and power of the State or any political sub-division thereof to tax corporations or corporate property. It is manifest upon a reading of section 64 that the prohibition in question was intended to prevent the extension of favors and discriminations in favor of corporations as against individuals.

It does not violate section 168 of the Constitution, directing that all property shall be taxed, that taxes shall be uniform, and shall be levied and collected under general laws. It is simply a limitation upon the time within which the political subdivisions of the State may correct an omission in the assessment of taxes. The mere direction of the Constitution that all property shall be taxed is inoperative without legislation as to the manner of imposing and enforcing the taxes. There can be no collection of taxes except in the manner provided by law; and back taxes can only be levied by special legislative authority. *Marye* v. *Diggs*, 98 Va. 752, 37 S. E. 315, 51 L. R. A. 902; *Whiting* v. *West Point*, 89 Va. 741, 743, 17 S. E. 1.

Section 183 of the Constitution prohibiting the exemption of property from taxation, except as otherwise and as therein provided, is invoked by the plaintiff in error, but that section has no application to this case. Sub-section 2 of section 508 of the Code is not an exemption from taxation within the meaning of the Constitution. The property of the defendant in error was subject to assessment and levy, but no due and timely assesment was made, and, as already indicated, we are of opinion that it was competent

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for the legislature to limit the time within which omitted taxes may be assessed.

Nor do we think there is any merit in the contention that section 174 of the Constitution, providing that the failure to assess property for taxation shall not defeat a subsequent assessment for and collection of taxes for any preceding years, can properly be construed to mean that the legislature may not validly impose a time limit within which county or district assessments for back taxes must be made. The section seems to be dealing only with "claims of the State;" and, in any event, the prohibition therein against a statute of limitations for claims for taxes is clearly confined to State taxes. The whole system of assessment and collection of taxes is dependent upon legislation, subject to clear and explicit constitutional restrictions. The failure to assess for taxation cannot defeat a subsequent assessment for county and district taxation, but the subsequent assessment must be made in the manner and within the time prescribed by law.

We have not attempted any extensive discussion of the various objections made to the validity of the act in question. Taking separately and as a whole the constitutional provisions relied upon to defeat it, we are of opinion that none of them will be violated by upholding the statute. Similar statutes are found in many other States having constitutional requirements similar to those in Virginia upon the subjects of the uniformity of and exemptions from taxation, and they have been very generally upheld.

The amendment to section 508 was intended as a statute of repose, and while it may result in releasing some just obligations and in permitting some intentional wrongdoers to escape taxation which ought to have been imposed upon them, the purpose of the amendment was a just one and the result, in the main, is for the public good.

We are of opinion that the legislature had the power to

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pass this law; and we are quite sure that the power is not sufficiently doubtful to justify us in declaring the act unconstitutional.

"The legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication. We look to the Constitution of the State, not for grants of power, but for limitations. When the prohibition is not found in the language of that instrument, or in its framework and general arrangement, there is no solid ground to pronounce the enactment void. The infractions must be clear and palpable." *Town of Danville* v. *Pace, supra.*

The second assignment of error is that the court erroneously refused to require interest to be paid upon the taxes ascertained to be due. The language of the court's order in this regard was as follows: "The court is further of opinion from the evidence that the omission of its capital from assessment for taxation for any of the said years was through no fault of the said United Cigarette Machine Company, Limited, and that no interest should be added to the taxes for any of said years, either State, county or district."

Section 508 of the Code, prior to the amendment of 1916, provided that interest should be charged on omitted taxes, but added that where the omission was due to "no fault of the person charged with the tax no interest shall be charged." When this case was remanded upon the former appeal, the question of interest was left open, the opinion of this court by Judge Cardwell directing that interest be charged, "unless it shall appear from the evidence adduced at the next hearing that the property was omitted through no fault of the defendant in error." Section 508, as amended, now provides for the addition of interest in all cases of omitted taxes, regardless of the question of the taxpayer's fault. The plaintiffs in error insist that whether

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the court applies the original or the amended section to the omitted capital of the defendant in error, interest must be charged in either case—under the original because of the alleged fault of the defendant in error, and under the amendment because its plain terms so direct.

The court was right in applying the original provisions of the statute with reference to the interest. We have already seen that while it is competent to pass retrospective laws affecting civil rights and liabilities, they are not favored by the courts. Statutes will not be given a retrospective effect except in cases where such effect was plainly intended by the legislature. This rule applies peculiarly to the laws relating to assessment of property which has been omitted from taxation, the rule being that such assessments are to be made according to the law in force at the time the assessment should have been made. 27 Am. & Eng. Ency. of L., pp. 700-701; *State* v. *Simons*, 70 Miss. 485, 502, 12 So. 477; *James, Auditor*, v. *Am. Surety Co.* (Ky.), 117 S. W. 411, 413; *Market Nat'l Bank* v. *Belmont*, 137 Mass. 407, 408.

The court was also right in holding that no interest should be charged. As to the years 1914 and 1915, the order of the court shows that the defendant in error correctly reported its assets to the commissioner, and counsel for plaintiff in error concede, in their reply brief, that interest for those years should not be awarded.

As to the years involved prior to 1914, we think that the evidence was sufficient to warrant the court in finding that the failure of the defendant in error to make a proper return was due to an honest belief that its intangible property was not subject to taxation because it was a foreign corporation. It was so advised by counsel, and the circuit court held in accordance with that view. This court, on appeal, decided otherwise, but until that decision was rendered the question was an open one in this State and there was room for an honest difference of opinion upon it. In a

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sense, and as a general rule, it is true that every man is presumed to know the law, and that ignorance of it furnishes no excuse; but when the legislature provided for the remission of interest on taxes omitted from assessment through "no fault" of the taxpayer, it must have meant to recognize a difference between omissions due to wilful and conscious wrongdoing and cases due to honest misapprehension and misconstruction of the tax laws. Any other conclusion would render the statute in this respect meaningless, since in every case of omitted taxes the taxpayer is in a sense in default. There is no moral or legal wrong in seeking non-taxable investments, provided it be done in good faith; and while we think the law should not, and we have held that in Virginia it shall not, afford immunity from taxation on intangible personal property of corporations situated like the defendant in error, we are unable, upon the evidence now before us, to hold that the circuit court erred in deciding that it was not a wrongdoer within the meaning of the statute.

There were a number of cross-assignments of error. We have considered all of them with care, and are of opinion that, in so far as they are not fully met (as most of them are) by the present and former decisions in this controversy, they are without merit, and that the judgment of the circuit court thereon was plainly right.

Affirmed.

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Wytheville.

COTTRELL V. MATHEWS AND OTHERS.

June 14, 1917.

Absent, Burks and Sims, JJ.

1. MASTER IN CHANCERY—*Report—Weight Attached To.*—The report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight, and should not be disturbed unless its conclusions are clearly at variance with the result of the evidence.
2. AMENDMENTS—*Bill in Equity—Cure of Irregularity.*—The irregularity of allowing a partition bill to be amended after the evidence was concluded and the commissioner's report filed, is entirely cured by a consent order of the court, by which it was agreed that the testimony taken before the commissioner, and the report of the commissioner, should be considered and treated with the same effect on the amended as upon the original bill.
3. INSANE PERSONS—*Guardian Ad Litem—Partition.*—Sections 2618 and 2619, Code of 1904, are inapplicable to partition suits.
4. GUARDIAN AD LITEM—*Suits in Equity.*—Where the amended bill in a partition suit suggested that one of the parties was *non compos mentis*, and prayed for the appointment of a guardian *ad litem*, but the party and her husband and the appellant were all strenuously denying her insanity, and the issue was undetermined when she died, the fact that no guardian *ad litem* was appointed for her under section 3255, Code of 1904, is no ground for reversing the decree.
5. WILLS—*Construction—Words of Survivorship.*—Words of survivorship in a will are to be construed to relate to the testator's death rather than to that of a life tenant, unless a contrary intent clearly appears.
6. WILLS—*Construction—Words of Survivorship.*—A will contained the following clause: "At the death of my wife, it is my will that my estate be equally divided between my surviving children, share and share alike."

   Held: That the words of survivorship in the will referred to the testator's death and not to his wife's death.

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7. WILLS—*Construction—Vested and Contingent Remainders.*—A will should be construed to favor vested rather than contingent remainders.

Appeal from the Circuit Court of Henrico county. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Marshall M. Gilliam, for the appellant.

A. W. Patterson and *E. L. Ryan,* for the appellees.

KELLY, J., delivered the opinion of the court.

Omitting unimportant details, the case is this: Daniel Mathews died many years ago, leaving a will whereby he directed the ultimate division of his estate among his several children, subject first to the discharge of certain trusts. The present suit in equity was brought in the year 1914 by William H. Mathews, one of the children, to obtain a partition of the real estate passing under the will. One of the defendants, Mrs. Maria (Mathews) Brown, who was the complainant's sister, claimed in her answer and cross-bill that she had acquired from the complainant, by purchase, all of his interest in the estate of Daniel Mathews, and had paid him therefor. It further developed in the course of the proceeding that a very short time before this suit was brought Mrs. Brown had made to Charles Cottrell, her nephew, a deed for all of her interest in the Daniel Mathews estate. This deed was not recorded until after the suit was brought, and it was not mentioned in the first answer which Mrs. Brown filed, nor in the first answer which Charles B. Cottrell filed in the cause. After learning the facts with reference to this deed, the complainant filed an amended

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bill, charging that Mrs. Brown was mentally incompetent to make a deed at the time she conveyed her interest to Cottrell. The amended bill alleged further that Mrs. Brown was very old and infirm in health, was childless, and that complainant, her next of kin, had a substantial interest in the conservation of her estate—and, as a fact appearing in the record, she died before the decree appealed from was entered.

The two questions of fact thus arising—first, whether William H. Mathews sold his interest in the estate to Mrs. Brown, and second, whether Mrs. Brown was capable of making a deed at the time of the conveyance to Cottrell—were both decided by the circuit court in favor of the complainant; and the sole assignment of error in the petition is that the court "erroneously held that Maria Brown was not entitled to William H. Mathews' interest in the estate of Daniel Mathews, and that her deed to Cottrell was null and void for lack of mental capacity on her part to make a deed."

The cause was referred to a commissioner of the court by a decree which embraced these two questions of fact, and the finding upon both was adverse to the appellant. He excepted to the report, and the circuit court sustained the commissioner. The depositions were all taken in the presence of the commissioner, and were returned and filed with a report which, in addition to the presumptions in its favor, bears upon its face the evidence of a most careful consideration of the questions submitted.

It is a familiar rule, many times emphasized in the decisions of this court, that the report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight, and should not be disturbed unless its conclusions are clearly at variance with the result of the evidence. *Shipman* v. *Fletcher*, 91 Va. 473, 479, 22 S. E. 458; *Lusk* v. *Pelter*, 101 Va. 790, 798, 45 S. E. 333; *Hall*

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v. *Hall*, 104 Va. 773, 776, 52 S. E. 557; *Va. & Ky. Ry. Co.* v. *Heninger*, 110 Va. 301, 303, 67 S. E. 185; *Smiley* v. *Smiley*, 112 Va. 490, 493, 71 S. E. 532, Ann. Cas. 1913 B, 1159. An examination of the evidence in the instant case fails to disclose to us any reason why the report and decree should be interfered with.

The appellant contends that the report and decree confirming the same were erroneous because the original bill was merely for a partition, and did not contain any averments relating to the transactions between him and Mrs. Brown. We do not understand that any question is raised as to the jurisdiction of the court in a partition suit under proper allegations, to set aside a deed and award the property embraced therein to the party entitled thereto; and the question of pleading is set at rest by the amended bill. It is true that this amendment was made after the evidence was concluded and the commissioner's report was filed, but the irregularity was entirely cured by the consent order of the court, which was in part as follows:

"And thereupon, by consent of all parties by counsel, this cause is docketed and set for hearing on the amended and supplemental bill of the plaintiff, and by like consent came on this day to be heard upon the original and amended bills, the several answers thereto, the petition of Thos. N. Brown, the general replications, the testimony of witnesses and the report of Comr. Ingram with the several exceptions thereto and the arguments of counsel, it being agreed that the testimony heretofore taken before Comr. Ingram, and the report of said commissioner, shall be considered and treated with the same effect on the amended as upon the original bill.

"It is further agreed that the only fact about which any additional testimony may be desired relates to the birth of a child or children alive to Thos. N. and Maria I. Brown, as affecting the claim of curtesy, and that the court shall

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consider and decide the cause upon all other questions pending inquiring into said matter of curtesy.

"And the court takes time to consider of its decision in the premises."

Nor does the fact that no guardian *ad litem* was appointed for Mrs. Brown afford any ground for reversing the decree. Sections 2618 and 2619 of the Code do not apply to suits of this character. If Mrs. Brown had survived, it would have been the proper practice, after her mental incompetency was established, to appoint a guardian *ad litem,* under section 3255, as in other ordinary suits in equity. Here, however, although the amended bill charged that she was *non compos mentis,* and prayed for the appointment of a guardian *ad litem,* she and her husband and the appellant were all strenuously denying her insanity, and that issue was undetermined when she died. Between the filing of the amended bill and the decision of the cause upon its merits, Mrs. Brown's death was suggested upon the record, and thereafter the cause was proceeded with in the name of her administrator, who, by counsel, consented to the decree from which the above quotation was taken.

Coming now to the cross-appeal, the appellee, under Rule VIII, assigns as error the construction which the circuit court placed upon the following clause in the will of Daniel Mathews: "At the death of my wife, it is my will that my estate be equally divided between my surviving children, share and share alike."

The commisioner and the court held that the words of survivorship in the will referred to the testator's death and not to his wife's death. This, we think, was the correct conclusion. The provision is not clear, but the result reached by the decree was the natural one, and is in accord with the rule which favors vested rather than contingent remainders. Words of survivorship in a will are to be construed to relate to the testator's death rather than to that of a life

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tenant, unless a contrary intent clearly appears. *Hansford* v. *Elliott*, 9 Leigh (36 Va.) 79; *Allison* v. *Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920.

There is no error in the decree complained of and it must be affirmed.

Affirmed.

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Wytheville.

DANIEL V. DOUGHTY AND OTHERS.

June 14, 1917.

Absent, Burks, J.*

1. BILL IN EQUITY—*Demurrer—Adverse Possession.*—A suit was brought to judicially determine the existence of an alley-way through certain town lots, and protect the use of the same by a perpetual injunction. It was contended that the bill showed on its face that the land which was sought to be appropriated as an alley-way had been held adversely by the defendants for more than the statutory period of fifteen years. The only allegation in the bill regarding the possession was that the defendants "refuse to open said alley as provided by said deeds and have closed same." How long the alley had been enclosed, and how long the alleged refusal to open it had continued, was not averred.

   Held: That the demurrer was properly overruled.

2. STREETS AND HIGHWAYS—*Establishment of Alley by Owner of Block—Section 2510-a, Code of 1904.*—The establishment of an alley by the owner of the block before he sold any lots therein did no violence to any of the provisions of section 2510-a, Code of 1904, prescribing the manner of vacating plats of town lots. This statute was not intended, and cannot be construed, to prohibit the creation of new or additional ways or easements, not shown on the original plat. Its manifest purpose and policy is to prevent the diminution of the public uses and conveniences guaranteed in the original plan of subdivision. The consent, properly evidenced, of the owners of the lots affected, is the only prerequisite to the establishment and opening of an alley such as is involved in this case; and subsequent purchasers must take *cum onere*. The closing of a street or alley would, of course, be a different proposition, and controlled by different considerations.

3. STREETS AND HIGHWAYS—*Creation of Alley—Deed.*—Where a deed duly recorded operates a valid creation and establishment

*Submitted before Judge Burks took his seat.

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of an alley-way through an entire block, a subsequent purchaser takes subject to it. The deed was in his chain of title, and under familiar rules of law was binding upon him.

4. EASEMENT—*Abandonment—Burden of Proof.*—The law is perfectly well settled that the burden of proof to show an abandonment of an easement is upon the party claiming such abandonment, and that he must establish the fact by clear and unequivocal evidence.

Appeal from a decree of the Circuit Court of Northampton county. Decree for complainants. Defendant appeals.

Affirmed.

The opinion states the case.

J. W. Topping and *John T. Daniel,* for the appellant.

John E. Nottingham, Jr., for the appellees.

KELLY, J., delivered the opinion of the court.

This is an appeal from a decree which judicially determines the existence of an alley-way through certain town lots, and protects the use of the same by a perpetual injunction.

The essential facts are these: The land comprised in what is now the town of Cape Charles was formerly owned by William L. Scott, who in 1884 subdivided it into lots, streets and alleys, and recorded a plat thereof according to law. Subsequently, Scott sold and conveyed sundry lots in the town, as thus laid off, to sundry individuals; and still later, by deed dated July 16, 1885, duly recorded, he sold and conveyed to A. J. Cassatt all lots facing south in a block bounded on the north by Monroe avenue, on the south by Tazewell avenue, on the east by Nectarine street, and on the west by Plum street. This block contained twenty-eight

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lots, half of them fronting on Monroe avenue and half on Tazewell avenue. The lots were all of the same width and depth, the latter dimension of each being 140 feet. There was originally, as shown by the recorded plat, no alley separating these lots, the two tiers adjoining each other in the rear; but the granting clause in the deed from Scott to Cassatt (made before any other lots in that block had been sold), immediately following the designation of the lots conveyed thereby, concluded with the words, "subject to an alley sixteen (16) feet in width, and in length extending from Plum street to Nectarine street, the center line of which said alley throughout its length, to be parallel with, and equal distant from Monroe avenue and Tazewell avenue, and which said alley shall be for the joint use of the parties hereto and their heirs and assigns." Attached to and recorded with the deed, was a plat of the block, showing the location of the alley thus established. In 1897 Cassatt sold and conveyed two of his lots to the appellant, John T. Daniel, by a deed which is not in the record, but which seems to have contained no reference to the alley. In 1903 the appellant acquired two more of the lots by a deed from the trustees appointed in the will of William L. Scott, and this latter deed was expressly made subject to the alley, in language practically identical with that used in the conveyance from Scott to Cassatt. The two lots last mentioned faced north and were immediately in the rear of the two purchased by the appellant from Cassatt. Appellant enclosed the lots without regard to the alley thereby completely obstructing the latter.

This suit was brought by John H. Doughty, and others owning some of the other lots in the block, against certain other lot owners in that block to require them to open the alley. The relief prayed for was granted, and John T. Daniel, one of the defendants, brings this appeal.

There was a demurrer to the bill which was overruled,

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and this action is assigned as error. The contention is that the bill showed on its face that the land which is sought to be appropriated as an alley-way has been held adversely by the defendants for more than the statutory period of fifteen years. We do not so understand the bill. The only allegation therein regarding the possession is that the defendants "refuse to open said alley as provided by said deeds and have closed same." How long the alley has been enclosed, and how long the alleged refusal to open it has continued, is not averred. This allegation could be entirely true, and perfectly consistent with the facts, if the alley had only been recently enclosed, or had been enclosed for the statutory period without any hostile purpose, and if the first refusal to open it had been as recent as the day before the suit was brought. Moreover, we see no real distinction between this and the fourth assignment of error, which, as we shall see has been expressly waived.

It is claimed, in the second assignment, that the decree violates the terms of section 2510-a of the Code prescribing the manner of vacating in whole or in part plats of town lots. The establishment of the alley by the owner of the block before he sold any lots therein did no violence to any of the provisions of the statute here invoked. This statute, as we conceive, was not intended, and cannot be construed, to prohibit the creation of new or additional ways or easements, not shown on the original plat. Its manifest purpose and policy is to prevent the diminution of the public uses and conveniences guaranteed in the original plan of subdivision. To give the statute the effect contended for by the appellant would be to place upon it a construction directly opposed to its plain reason and spirit. The consent, properly evidenced, of the owners of the lots affected, is the only prerequisite to the establishment and opening of an alley such as is involved in this case; and subsequent purchasers must take *cum onere*. The closing of a street

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or alley would, of course, be a different proposition, and controlled by different considerations.

It is further contended that the decree was erroneous in so far as the lots purchased by the appellant in 1903 are affected, because "the attempted creation of the alley was without force and effect, as by the provisions of the reservation itself the alley was to be for the use of those not parties to the deed, assigns being those to whom something is assigned subsequent to the date of the instrument using the term, and according to the court's construction of this reservation the alley was also intended for the use and benefit of those parties to whom William L. Scott assigned prior to" the conveyance of the two lots purchased by the appellant in 1903.

Whatever might be the merits of this contention if the cases in hand rested solely upon the reservation contained in the deed of 1903 from Cassatt to the appellant, the contention is without merit here because the deed above recited from Scott to Cassatt, which was duly recorded, operated an unquestionably valid creation and establishment of the alley-way through the entire block, and the appellant took subject to it. It was in his chain of title, and under familiar rules of law was binding upon him.

The fourth assignment of error is to the effect that, "it was error on the part of the court to enter the decree, certainly as to lots 368 and 369 (purchased directly from Cassatt), as by the depositions introduced these lots, including that part of the alley which was taken from them, had been held by petitioner by actual, open, uninterrupted, notorious and adverse possession under color of title for the statutory period of fifteen years" before the suit was brought. In the oral argument of this case, counsel for the appellant stated to the court that unless the decree complained of should be reversed upon some other ground, this assignment was to be treated as waived and abandoned.

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Finally, we are asked to reverse the decree because the alley in question "was first attempted to be created in 1885, and up to the year 1915 it had not been opened, nor had there been any attempt to do so; that during the entire time between 1885 and 1915 the space which this alley would occupy was obstructed by buildings and enclosures belonging to both plaintiffs and defendants to this suit; and that these facts constituted an abandonment and extinguishment of the right."

We have looked carefully to the evidence and find it exceedingly meagre and wholly insufficient to support the allegations of this assignment. Whatever may be the existing facts as to the alleged long continued obstruction of the alley, they are certainly not sufficiently developed in the record to meet the burden of proof and the character of proof requisite to establish the abandonment of an easement. The law is perfectly well settled that the burden of proof to show an abandonment of an easement is upon the party claiming such abandonment, and that he must establish the fact by clear and unequivocal evidence. Jones on Easements, p. 682, sec. 850; 14 Cyc. 1193; 9 R. C. L., p. 813, sec. 68, note 11; *Scott* v. *Moore,* 98 Va. 668, 686; 37 S. E. 342, 81 Am. St. Rep. 749.

We find no error in the decree complained of, and it will be affirmed.

Affirmed.

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Syllabus.

Wytheville.

DREWRY-HUGHES COMPANY v. THROCKMORTON, TRUSTEE.

June 14, 1917.

Absent, Burks, J.*

1. STOCK AND STOCKHOLDERS—*Preferred Stock—Dividends.*—Both in the charter of a corporation and in the preferred stock certificate issued by it, it was provided that the preferred stock should be entitled to a dividend of six per cent. out of the net earnings of the company, and that the claim to such dividend if not earned in any one year was to accumulate and to constitute a preferred charge over the common stock on the income of succeeding years until it was discharged. The import of this language is perfectly clear and under its authority the directors would not be justified in declaring or paying dividends on preferred stock in any one year if not earned, but the dividends which would have been paid, if they had been earned, would remain as a claim upon the earnings of each succeeding year in which earnings were made, to be paid in preference to the common stockholders, as well as the dividends accruing in the succeeding years. It was plainly the intention thus to provide, that so long as the corporation conducted its business and was a going concern the dividends should be guaranteed and cumulative.
2. STOCK AND STOCKHOLDERS—*Preferred Stock—Dividends.*—After making the provision in the foregoing syllabus, the certificate provides for the preferential rights of the preferred stockholder, in the event the corporation ceases to do business or goes into liquidation, in the following language: "And the preferred stock is likewise to have a prior claim, in the event of liquidation or dissolution, to the amount of its face value and of any arrears of dividend due and unpaid to it upon the assets of the company over and above the common stock, but in no case is the preferred stock to be entitled to receive more than its regular 6 *per cent.* yearly dividend and any arrearages, with interest, that may be due to it on that account, and to

*Submitted before Judge Burks took his seat.

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the amount of its face value in the event of liquidation or dissolution." The charter contained practically the same provision.

Held: Under these provisions "that the corporation had agreed with its preferred stockholders that so long as the corporation did business it would pay or allow to accumulate as a preferred claim a dividend of six *per cent.* (6%) annually and that, when the company ceased to do business, the face value of the preferred stock and any of the dividends unpaid and in arrears were to be paid out of the assets of the corporation in preference to the common stockholders."

3. DIVIDENDS—*Power of Directors to Declare Unearned Dividends—Preferred Stock.*—It is fundamental in the law of corporations that the directors have no authority to declare a dividend upon any of its stock, common or preferred, unless the dividends are earned.

4. STOCK AND STOCKHOLDERS—*Preferred Stockholders.*—Preferred stockholders are not creditors of the company, nor are the dividends as to which they may be preferred to be regarded as interest upon a loan. The payments made to the preferred stockholders are dividends.

5. STOCK AND STOCKHOLDERS—*Preferred Stock—Dividends—Liquidation of Corporation.*—No dividends can be either declared or earned after the corporation ceases to do business. Therefore, the "arrears of dividends due and unpaid," for which the preferred stockholder is given a preference as well as for the face value of his stock, means such unpaid dividends as had accumulated up to the time the corporation ceased to do business or went into liquidation.

6. STOCK AND STOCKHOLDERS—*Liquidation of Corporation—Agreement Among Stockholders.*—A stipulation plainly made between the stockholders, or classes of stockholders, as to how the assets of the corporation shall be distributed among the stockholders in liquidation, after all claims upon the corporation by creditors and others have been satisfied, is permissible and valid and is not forbidden by the principles of our corporation law.

7. STOCK AND STOCKHOLDERS—*Preferred Stockholders—Interest on Dividends After Liquidation.*—In the charter of a corporation nothing was said about interest on preferred dividends in arrears and unpaid at the time the company goes into liquidation, while in the certificate of stock reference is made to the fact that in no case is the preferred stock to be entitled to receive more than its regular six *per cent.* yearly dividend and any arrearages, with interest. A preferred stock dividend

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bears no interest after liquidation. The rights of the stockholders, both preferred and common, should stand as fixed at the time the liquidation commenced. The distribution of the assets of the corporation in return to them of their input of capital is not to be regarded as the repayment of a debt or of money loaned.

Error to a judgment of the Law and Equity Court of the city of Richmond, in an arbitration proceeding under Chapter CXLIII, Code of 1904, sections 3006-3010. Judgment for the plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

George Bryan, for the plaintiff in error.

C. W. Throckmorton, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

Drewry-Hughes Company, a corporation organized under the laws of Virginia for the purpose of doing a wholesale dry goods and notion business, found its business unprofitable and decided to distribute its assets. All of the debts of the corporation have been paid, and the question here involved is as to the amount of dividend to be paid to Throckmorton, trustee, the holder of eight shares of its cumulative six *per cent.* preferred stock.

The controversy was submitted to the arbitrament of Honorable Beverley T. Crump, who is also judge of the Law and Equity Court of the city of Richmond. The parties, proceeding in accordance with ch. 143, secs. 3006-3010, inclusive, of the Code, providing a method by which an award may be made the judgment of a court, agreed that the award should be made the judgment of the Law and Equity Court of the city of Richmond, and the submission

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provided that "the award and judgment in pursuance thereof should be appealable to the Supreme Court of Appeals of Virginia, as are other judgments of this court upon proper proceedings taken for the purpose."

The question at issue depends upon the proper construction of the agreement between the preferred and common stockholders of the corporation embodied in the charter and in the stock certificates, and the opinion of the learned arbitrator contains all the facts necessary for the determination of the issue involved, and so fully accords with our views, that we hereby adopt it as the opinion of the court in this case. It reads as follows:

"Upon the question submitted to me as arbitrator in the matter of Throckmorton, Trustee, *versus* Drewry-Hughes Company, I have reached the following conclusions:

"1. The character and privileges of the preferred stock are definitely fixed by a sentence in the stock certificate issued to the preferred stockholders and by a sentence in the charter of the company authorizing the issuance of such stock. Both in the charter and in the certificate it is provided that the preferred stock shall be entitled to a dividend of six *per cent.* (6%) out of the net earnings of the company, and that the claim to such dividend if not earned in any one year is to accumulate and to constitute a preferred charge over the common stock on the income of succeeding years until the same is discharged. The import of this language is perfectly clear and under its authority the directors would not be justified in declaring or paying dividends on preferred stock in any one year if not earned, but the dividends which would have been paid, if they had been earned, would remain as a claim upon the earnings of each succeeding year in which earnings were made, to be paid in preference to the common stockholders, as well as the dividends accruing in the succeeding years. It was plainly the intention thus to provide, that so long as the cor-

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poration conducted its business and was a going concern the dividends should be guaranteed and cumulative. After making this provision, and following thereupon after a semicolon, the charter and the certificate each provide for the preferential rights of the preferred stockholders, in the event that the corporation ceases to do business or goes into liquidation. Provision for such a contingency is made in the certificate in the following language: '* * * and the preferred stock is likewise to have a prior claim, in the event of liquidation or dissolution, to the amount of its face value and of any arrears of dividend due and unpaid to it upon the assets of the company over and above the common stock, but in no case is the preferred stock to be entitled to receive more than its regular 6 *per cent.* yearly dividend and any arrearages, with interest, that may be due to it on that account, and to the amount of its face value in the event of liquidation or dissolution.' And in the charter in the following language: '* * and the preferred stock is likewise to have a prior claim, in the event of liquidation or dissolution, to the amount of its face value and of any arrears of dividends due and unpaid to it, upon the assets of the company over and above the common stock.'

"There is no practical difference between the language of the charter and the certificate and it is, it seems to me, impossible to resist the conclusion that the writer of the charter and of the certificate intended to state that if and when the corporation ceased to do business and was wound up, there should be paid out of the assets of the corporation, after satisfying all creditors and before the payment of anything on the common stock, both the face value of the preferred stock and any arrears of dividends on that stock due and unpaid. In fact, that is the language of both the charter and the certificate and it is thus plainly provided in both that if, at the time the corporation goes into liquidation or becomes dissolved, there are unpaid cumulative

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dividends due to the preferred stockholders, such dividends ought to be paid as well as the capital of the preferred stock in preference to the common stockholders. Inasmuch as it had been just stipulated in the charter and in the certificate that the dividends, although not earned in any one year, were to constitute a standing claim against the income of future years, it is evident that the 'arrears of dividends' mentioned in the above quotations from the charter and the certificate had reference to the unpaid dividends existing at the time the corporation ceased to do business without reference to the reason for nonpayment, whether because of a failure on the part of the directors to order their payment or because they had not been earned during the year for which they became in arrears.

"I conclude, therefore, that the corporation had agreed with its preferred stockholders that so long as the corporation did business it would pay or allow to accumulate as a preferred claim a dividend of six *per cent.* (6%) annually and that, when the company ceased to do business, the face value of the preferred stock and any of the dividends unpaid and in arrears were to be paid out of the assets of the corporation in preference to the common stockholders.

"2. In determining the legal effect of such a stipulation as that just stated, I have examined the 16th chapter of Cook on Corporations, which treats exhaustively of the rights of preferred stockholders. Review of the earlier authorities may be found in 27 L. R. A. 136 in a note to the Massachusetts case of *Field* v. *Lamson, etc. Co.*, there reported.

"It is fundamental in the law of corporations that the directors have no authority to declare a dividend upon any of its stock, common or preferred, unless the dividends are earned; and it is, therefore, not permitted to a corporation to agree to pay annual dividends on preferred stock, at all events, whether or not the earnings of the company be

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sufficient to pay them. While these principles are acknowledged it is, nevertheless, a further fundamental principle of corporation law that, as to the rights between themselves, stockholders may agree and bind themselves so long as they do not infringe upon the rights of the public or of its creditors and those dealing with it, to have its capital kept unimpaired. My conclusion from the examination of the law is that a stipulation plainly made between the stockholders, or classes of stockholders, as to how the assets of the corporation shall be distributed among the stockholders in liquidation, after all claims upon the corporation by creditors and others have been satisfied, is permissible and valid and is not forbidden by the principles of our corporation law.

"It is well settled, however, that preferred stockholders are not creditors of the company, nor are the dividends as to which they may be preferred to be regarded as interest upon a loan. The payments made to the preferred stockholders are dividends and should not be made, therefore, unless they are earned, so long as the corporation is a *going concern*, and the right to payment of such unearned and unpaid dividends out of the assets of the corporation only arises because the common stockholders have agreed that such may be the case. No dividends can be either declared or earned after the corporation ceases to do business. Therefore, the 'arrears of dividends due and unpaid,' for which the preferred stockholder is given a preference as well as for the face value of his stock, means such unpaid dividends as had accumulated up to the time the corporation ceased to do business or went into liquidation.

"I am, therefore, of opinion that the preferred stockholders of the Drewry-Hughes Company are entitled to be paid out of the assets of the company, in liquidation, the dividends upon their preferred stock, if any, which had

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accumulated and were unpaid at the time the company started to wind up its business.

"3. Upon consideration of the facts appearing in the supplemental statement of agreed facts, I think it is reasonable and proper to conclude that, in the spring of 1915, the company manifested its intention to wind up its business and give up any further attempt at reorganizing the company, or continuing to do business for the purpose of earning profit on its capital. In the statement made by the president of the company at the end of the year 1914 he states that a profit was made during the first six months of that year, but during the second half of the year and upon the commencement of the European war its sales decreased very rapidly, resulting in a loss for the whole year. During the year 1914, however, it is plain that the company and its officers conducted the business of the company with a view to its continuation and not with a view to its liquidation. In the spring of 1915 the company was evidently prepared to throw up its hands and cease to do active business and from that time on, practically, it was in liquidation, selling its goods on hand, collecting its assets and paying its debts. In January, 1915, there was in arrears and unpaid to the preferred stockholders a dividend of six *per cent.* (6%) for the year 1914, which the common stockholders had agreed should be paid out of the assets of the company in the event of liquidation, prior to any payments made upon the common stock. I think the preferred stockholders are entitled to that year's dividend. Inasmuch as the company, during the year of 1915, practically commencing in the spring of that year, went into liquidation, there could be no further question of dividends and, after liquidation commences, preferred stockholders and common stockholders are, in the eyes of the law, upon the same plane, both being mere stockholders, excepting in

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so far as their participation in the assets of the company had been agreed upon between them.

"4. My conclusion, therefore, upon the question submitted to me between Mr. Throckmorton and the company is that, when the balance of the assets of the company is to be paid over to stockholders in final distribution, there should be paid to Mr. Throckmorton the face value of his stock and the sum of sixty dollars ($60) upon each share before anything is paid to the common stockholders. In the charter of the company nothing is said about interest on dividends in arrears and unpaid at the time the company goes into liquidation while, in the certificate, reference is made to the fact that in no case is the preferred stock to be entitled to receive more than its regular six *per cent.* (6%) yearly dividend and any arrearages, with interest. I do not think that the year's dividend to which Mr. Throckmorton is entitled should bear interest. The rights of the stockholders, both preferred and common, should stand as fixed at the time the liquidation commenced. The distribution of the assets of the corporation in return to them of their input of capital is not to be regarded as the repayment of a debt or of money loaned."

The judgment is without error and will be affirmed.

Affirmed.

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Syllabus.

CRIMINAL CASES.

Richmond.

TYLER v. COMMONWEALTH.

January 11, 1917.

Absent, Prentis, J.*

1. BURGLARY—*Presumption from Possession of Stolen Goods.*—The possession of stolen goods is, of itself, not even *prima facie* evidence of housebreaking or of burglary.

2.—BURGLARY—*Possession of Stolen Goods.*—Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of larceny, but extrinsic mechanical indications may constitute such additional evidence.

3. BURGLARY—*Possession of Stolen Goods—Exclusive Possession.*—The possession of stolen goods contemplated by the rule above referred to is an exclusive possession on the part of the accused; otherwise such rule is not applicable. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge.

4 BURGLARY—*Possession of Stolen Goods—Burden of Proof—Exclusive Possession.*—The burden rests upon the Commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession.

*Submitted before Judge Burks took his seat.

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5. BURGLARY—*Evidence—Exclusive Possession of Stolen Goods.*—The stolen property was found in the kitchen of a house in which accused rented a room. The Commonwealth proved that the accused had access thereto, but did not prove that he was the only person that had such access. It was held that exclusive possession by accused of the stolen property was not shown.

6. BURGLARY—*Evidence—Posession of Stolen Goods.*—Upon being asked permission by another to wear the stolen property, the accused replied, "All right, I don't care if you do." It was held that this reply of the accused was not sufficiently distinct and unequivocal in meaning to prove, with that degree of certainty required in a criminal case, an assertion of property by the accused in the stolen article. It was consistent with a claim of ownership on the part of accused, but was also consistent with a position of indifference.

Error to a judgment of the Corporation Court of the city of Staunton.

Reversed.

The opinion states the case.

L. Travis White, for the plaintiff in error.

John Garland Pollard, Attorney-General, and *Leslie C. Garnett, Assistant Attorney-General,* for the Commonwealth.

SIMS, J., delivered the opinion of the court.

In this case the indictment charged the accused with feloniously breaking and entering, in the night time, a storehouse of one S. P. Mann, with the intent to commit larceny, and that the accused did feloniously steal, take and carry away one gold watch charm of the value of five dollars, of the goods and chattels of the said S. P. Mann in the said storehouse then and there being found, etc. There were two trials. Upon the first trial the jury were unable

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to agree. Upon the second trial the verdict of the jury was as follows: "We, the jury, find the prisoner guilty of housebreaking and fix his punishment at three years in the penitentiary."

The accused moved the court below to set aside the verdict as contrary to the law and the evidence and grant him a new trial. This motion the court overruled and entered judgment passing sentence in accordance with said verdict. To this action and judgment of the court the accused excepted, and in his petition to this court for a writ of error and supersedeas assigns three grounds of error, which raise practically two questions only, both of them questions of fact.

a. Whether there is any evidence in the case of "other inculpatory circumstances," in addition to the possession of the stolen goods, to warrant the jury in finding the accused guilty of housebreaking?

b. Whether there is sufficient evidence in the case to sustain the burden which rests upon the Commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession?

The law in Virginia is well settled that the possession of stolen goods is of itself not even *prima facie* evidence of housebreaking or of burglary. *Gravely's Case,* 86 Va. 396; 10 S. E. 431; *Walker's Case,* 28 Gratt. (69 Va.) 969; *Porterfield's Case,* 91 Va. 801, 22 S. E. 352.

The rule in Virginia, however, is that, "* * * when goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and when, in addition to such possession, other inculpatory circumstances are proved, such for example as the refusal of the accused to give any account, or his giving a false account of how he came by the goods, such proof will warrant a conviction.

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In other words, to use the language of the books, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is super-added to that of larceny, but extrinsic mechanical indications may constitute such additional evidence." *Gravely's Case, supra.*

It is also well-settled law that the possession of stolen goods contemplated by the rule in Virginia, above referred to, is an *exclusive* possession on the part of the accused, otherwise such rule is not applicable.

"The exclusive possession of money recently stolen unaccompanied by a reasonable account of how the possession was acquired, creates a presumption that the possessor is the thief." *Porterfield's Case,* 91 Va. 801, 805, 22 S. E. 352, 354.

"But to raise the presumption of guilt from the possession of the fruits of (or) the instruments of crime by the prisoner it is necessary that they be found in his *exclusive possession.* A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed, as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others had equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone." 3 Greenleaf Ev., sec. 33.

As we understand it, this proposition of law is not controverted before us. At any rate we consider it a correct statement of the law.

It is in effect conceded on the part of the Commonwealth that the "other inculpatory circumstances," relied on by it

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are of a character insufficient to sustain the conviction of the accused, unless the alleged possession of stolen goods by the accused was such as to bring the case within the rule in Virginia above referred to, laid down in *Gravely's Case*, and other cases above cited—that is to say, unless such possession on the part of the accused was *exclusive*.

Therefore:

In the view we take of this case, it will not be necessary for us to pass upon the first assignment of error, but only upon the second assignment of error and the single question of fact thereby raised; namely:

1. Is there sufficient evidence in the case to sustain the burden which rests upon the Commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession?

The facts of the case bearing on this point are as follows: The most that can be said of the evidence is that it proved a constructive possession on the part of the accused of the stolen watch charm. It was not found upon his person, or in his private apartment, although that was searched twice, nor in a place of which he kept the key. His "private apartment" was a room in a house rented by one Katie Houston. The stolen watch charm was found in Katie Houston's kitchen on top of a safe. The Commonwealth, it is true, proved that the accused had access thereto; but it did not prove that he was the only person that had access thereto. Certainly, from the testimony introduced by the Commonwealth, Katie Houston "had right of access" and "equal facility of access" to her kitchen as did the accused. In this, a criminal case, the Commonwealth cannot sustain the position that in the absence of proof on the part of the accused that Katie Houston, or some one other than himself, did in fact occupy her kitchen, or enter it, he must be considered as the sole person having access to such room. The burden of proof on this point, one of the essential links in

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the chain of evidence upon which it depended for conviction, was upon the Commonwealth and not upon the accused, and was clearly not sustained in this particular.

The only remaining evidence bearing on the question of exclusive possession is the following: One Will Adams, colored, being in the kitchen room above mentioned while the accused was cooking his breakfast one Sunday morning, on reaching up on the kitchen safe for a match, found the stolen watch charm. On finding the watch charm Adams said: "I'm going out into the country today, can I wear this?" Accused said: "All right, I don't care if you do." This reply of accused is relied on by the Commonwealth to prove an assertion of ownership by the accused of the watch charm, *i. e.*, to prove accused's possession of it.

As laid down by 2 Wharton's Cr. Ev. (10th ed.) 1509: "The possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant."

We cannot feel that the reply of the accused quoted is sufficiently distinct and unequivocal in meaning to prove, with that degree of certainty required in a criminal case, an assertion of property by the accused in the watch charm. It is consistent, it is true, with a claim of ownership on his part; but it is also consistent with a position of indifference to and lack of interest in the subject, and with the meaning that so far as he was concerned there was no objection to Adams wearing the charm.

The only case cited in brief for the Commonwealth on the latter point is that of *Clark* v. *Whittier*, 19 Conn. 319, 48 Am. Dec. 160, 163. That was a civil case and in that case there was actual personal possession taken of the property in question.

On the whole, therefore, it seems clear that the Commonwealth has not sustained the burden of proof resting upon

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it in the instant case to show exclusive possession by the accused of the stolen property. On this ground we are of opinion to reverse the judgment complained of and to grant the accused a new trial, which will be accordingly done.

Reversed.

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Richmond.

LEWIS v. COMMONWEALTH.

January 16, 1917.

1. LARCENY—*Variance.*—Upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment.
2. LARCENY BY FALSE PRETENSES—*Charge of Larceny of Money—Proof of Larceny of a Check.*—An indictment alleged the larceny of money by false pretenses, whereas the proof showed the larceny of a check afterwards cashed by defendant.

   Held: That in every real sense money was paid to the accused, and, therefore, the charge in the indictment was substantially proven.

Error to a judgment of the Hustings Court of the city of Richmond.

Affirmed.

The opinion states the case.

L. O. Wendenburg, for the plaintiff in error.

John Garland Pollard, Attorney-General, and *Leslie C. Garnett, Assistant Attorney-General,* for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

The plaintiff in error, J. A. Lewis, was indicted, tried and convicted in the Hustings Court of the city of Richmond for the larceny of money amounting to the sum of $174.00, the property of the "Home Beneficial Association," and sentenced to serve a term of one year in the peniten-

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tiary in accordance with the finding of the jury. To that judgment this writ of error was awarded.

The certified facts are very few and not disputed. It appears that the life of Emily Capps was insured in the Home Beneficial Association in the sum of $174.00 for the benefit of Lucy Ruffin, who claimed the amount due under the policy under the false pretense that Emily Capps was dead; that the prisoner, who was a practicing physician, falsely and fraudulently certified to the association that the insured was dead, and presented an order from Lucy Ruffin directing all money due her under the claim of Emily Capps to be paid to the accused, Dr. J. A. Lewis. Thereupon, the Home Beneficial Association delivered to Dr. Lewis a check for $174.00, drawn upon the Merchants National Bank of Richmond. This check the accused endorsed and had cashed by the St. Luke's Penny Savings Bank, where he did business; from this bank the check passed in due course through the clearing house of Richmond, to the Merchants National Bank, upon which it was drawn, where it was paid and charged to the account of the Home Beneficial Association.

The sole contention of the prisoner is that the indictment alleged the larceny of money, whereas the proof showed the larceny of a check, thereby creating such a variance between the *allegata* and the *probata* as entitled him to a new trial.

The Code (1904), section 3722, provides that, "If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of the larceny thereof."

Under this statute, if it was larceny to obtain the money by false pretenses, it was equally larceny to obtain the check by the same means. The check was received as an equivalent for the money, according to the universal custom in such cases, and was the usual and proper means for obtain-

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ing the money. It has been repeatedly held by this court that, upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment. *Anable's Case*, 24 Gratt. (65 Va.) 563; *Pitsnogle* v. *Comth*, 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867.

We are of opinion that, upon the facts in the case at bar, the ultimate offense of obtaining money by false pretense is supported by the evidence that such money was fraudulently obtained by means of a check fraudulently acquired. In every real sense money was paid to the accused, and, therefore, the charge in the indictment was substantially proved. The check was but an incident of the transaction by which the fraud was perpetrated, and but one of the steps leading to the ultimate crime of obtaining money under false pretenses.

The identical question here involved, so far as advised, has not until now been before this court. It has, however, been considered and disposed of in many other jurisdictions, the great weight of authority sustaining the view we have taken.

In *State* v. *Palmer*, 40 Kansas, 474, 20 Pac. 270, the indictment charged that the accused unlawfully and fraudulently, with intent to cheat one Certwell, did falsely represent that he was the owner of a certain three year old roan mare then in his possession, and could pass a good title thereto; that the said Certwell, believing the false representation to be true, was induced to purchase the said roan mare and pay the said Palmer the sum of $85.00. The court said: "The evidence, however, shows that Certwell drew the check for $75.00 in favor of the defendant upon the bank of Western Kansas, and then went with the defendant to the bank, identified him, and the bank then took the check from the defendant and paid him $75.00 out of money deposited in the bank by Certwell and charged

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the same to Certwell's account. This was certainly the obtaining of money as well as the obtaining of the check. *Roberts* v. *The People*, 9 Col. 458, 13 Pac. 631."

In *State* v. *Terry*, 109 Mo. 601, 19 S. W. 206, the court said: "The point is made that the indictment charges that the defendant attempted to obtain the money, but that the proof shows that, had the offense been consummated, he would not have received any money, but merely a check. There is no force in this contention, because the attempt is the gravamen of the charge, and the fact that the result of the completed crime would only have been a check, upon which the money could have been obtained, cuts no figure in the case and has no tendency to disprove the fact of the attempt having been made."

In *State* v. *Daniel*, 83 S. C. 309, 65 S. E. 236, 237, in which it was held that proof of a larceny of a note will not support an indictment charging larceny of money, the court said: "In *Hunt* v. *State*, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34 [2 Ann. Cas. 33], proof of obtaining a check on which the bank paid the money was held to be not a fatal variance, in a trial for obtaining money under false pretenses. In that case the court well says: 'It would be carrying a technicality to a most dangerous extreme to hold that proof of the mere instrumentalities of obtaining the money constituted a variance with the charge of obtaining the money itself, where the same evidence also showed the fact of obtaining the money itself.'" The same principle was applied in *People* v. *Lammerts*, 164 N. Y. 137, 58 N. E. 22, *Schaumloeffel* v. *State*, 102 Md. 470, 62 Atl. 803; *People* v. *Hoffman*, 142 Mich. 531, 105 N. W. 838; *State* v. *Palmer*, 40 Kan. 474, 20 Pac. 270; *State* v. *Gibson*, 132 Iowa 53, 106 N. W. 270. All of these cases rest on the ground that as an ultimate fact the money was obtained; the check being only a means of obtaining it." Approved in *State* v. *Jackson*, 87 S. C. 407, 69 S. E. 883 (decided in 1911).

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In *State* v. *Gibson*, 132 Iowa, 53, 106 N. W. 270, the indictment charged the defendant with obtaining $24.80 by false pretenses. The evidence was that the defendant obtained a check for $24.80 drawn upon a bank in Des Moines, Iowa, received by him in Chickasaw county and cashed in a bank at New Hampton. The court said: "Again it is argued that there is a variance between the allegations and proof in this, that defendant is charged with having received money, whereas the proof shows that he received a check. There is also some conflict in the adjudicated cases upon this proposition; but we think the better rule is that, under such circumstances as we have here, the defendant should be held to have received money from the insurance association at the place where the check was cashed by the bank upon which it was drawn, the intermediate bank which took it up or advanced defendant the money thereon being defendant's agent to forward the same and to receive the money thereon for the defendant, and that the final payment by the bank upon which it was drawn, was a payment to the defendant. *State* v. *Palmer* and *Com.* v. *Wood, supra.* See also, *People* v. *Dimick, supra.* But, however this may be, there was no variance under any of the cases to which our attention has been called, for the reason that defendant did in fact receive money from the plaintiff; the check simply being an instrument through which the money was received. This may not be the rule as to foreign bills of exchange or other papers to which the law merchant is fully applicable; but as to checks, which are ordinarily nothing more than equitable assignments of a fund, this seems to be the more logical view."

In *State* v. *Germain*, 54 Or. 395, 103 Pac. 521, upon an indictment for obtaining money by false pretense, the court said: "It was claimed on the argument that there was a variance between the indictment and the proof, as the evidence showed that Clinesmith gave defendant his check

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on a Portland bank, while the indictment alleges that the defendant received money. The evidence also shows that the defendant cashed the check before he was arrested. The check was the mere vehicle by which the defendant was enabled to obtain Clinesmith's money, and there was no variance."

To the same effect are the cases of *People* v. *Dimmic*, 107 N. Y. 13, 14 N. E. 178; *Bates* v. *State*, 124 Wis. 612, 103 N. W. 251, 4 Ann. Cas. 365; *Schaumloeffel* v. *State*, 102 Md. 470, 62 Atl. 803.

We recognize the rule that certainty to a reasonable extent is an essential requirement of criminal pleading. One of its objects is to give notice to the party of the nature of the charge. We are unable, however, to see how there can be any danger of surprise in the present case, where the prisoner is charged with stealing $174.00 from the Home Beneficial Association. The substance of such a charge is that the accused has fraudulently converted that sum of money to his own use, and whether it was done by means of a larceny at common law or by obtaining, by false pretenses, a check representing the money, which he has cashed, can make no difference in regard to taking the accused by surprise. As said by Judge Moncure in *Anable's Case:* "He knows what the law is, and that if it be proved that he effected his criminal intent by either of the means mentioned he will be convicted of larceny, and he must be prepared to meet that proof if he can."

"One of the chief objects of our criminal statutes is to prevent the acquittal of guilty persons on account of some nice technical distinction between the offense charged and the offense proved against a person accused of crime." *Anable's Case, supra.*

We are of opinion that the plaintiff in error has not been prejudiced by the judgment complained of, and it is affirmed.

Affirmed.

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ADVANCEMENTS—Continued.

Purchaser from Distributee—Continued.

and only buys and can only take the interest of his grantor in the estate. The doctrine of *bona fide* purchaser has no application. The purchaser only buys the heir's interest, and when that interest is ascertained he is entitled to that and to nothing more. Corbitt *v.* Wright, 471.

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Partition.—The irregularity of allowing a partition bill to be amended after the evidence was concluded and the commissioner's report filed, is entirely cured by a consent order of the court, by which it was agreed that the testimony taken before the commissioner, and the report of the commissioner, should be considered and treated with the same effect on the amended as upon the original bill. Cottrell *v.* Mathews, 847.

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Statute of Jeofails.—By section 3272 of the Code, special demurrers are abolished in Virginia and there is no error in overruling a demurrer to a declaration, where the assignment of grounds of demurrer pointed out no defect not cured by this section, which provides that no demurrer no defects in the pleadings shall be regarded unless something be omitted essential to the action or defense. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. The allegation of duty was mere surplusage, and under the provisions of sections 3246, 3449 and 3272, Code 1904, directing the court to disregard formal defects in pleading, it was no ground for a motion in arrest of judgment. Richmond *v.* McCormack, 552.

In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. If by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted and the instructions of the court, which clearly and accurately defined the duty of the city to be "to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exercising reasonable and ordinary care to avoid injury and danger while using the same." Richmond *v.* McCormack, 552.

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AMENDMENTS—Continued.

Waiver of Defects.—After the plaintiff had rested and the defendant had introduced one witness, the court allowed the plaintiff to amend the declaration by setting out the precise dates upon which various contracts and sales had been made, and the point was raised that the declaration as amended misjoined causes of action. The action was trespass on the case in tort and it was claimed that the third count in the declaration was in contract. Even if the point had merit, inasmuch as defendant had failed to specify this ground in its original demurrer, and had pleaded not guilty, it had been waived. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

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Adverse Possession.—Omission to make any reference to the right of tacking possessions in an instruction is harmless, where the testimony is to the effect that the only possession claimed was that of the party himself. Christian *v.* Bulbeck, 74.

Affirmance.—Where the date fixed by the trial court for an extension ordinance to go into effect has passed pending an appeal from the order of extension, this court, on affirming the judgment, will fix a new date for the ordinance to go into effect. Warwick County *v.* Newport News, 177.

Annexation of Territory.—Where the date fixed by the trial court for an extension ordinance to go into effect has passed pending an appeal from the order of extension, this court, on affirming the judgment, will fix a new date for the ordinance to go into effect. Warwick County *v.* Newport News, 177.

Arrest of Judgment.—See JUDGMENTS AND DECREES.

Assignment of Error.—See ASSIGNMENT OF ERRORS.

Automobiles.—Bohannon-King Co. *v.* Vellines, Admx., 428.

Bill of Exceptions.—See EXCEPTIONS, BILL OF.

Contributory Negligence.—Where the question of contributory negligence was properly submitted to the jury under well-established principles, a mere doubt as to whether the jury decided the question properly is plainly insufficient to justify a reversal of the judgment. Richmond *v.* McCormack, 552.

Costs.—It is unusual for the Court of Appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error. Williams *v.* Bond, 678.

Drains and Sewers.—In a proceeding under the provisions of section 2576, Code of 1904, to determine the right of drainage

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APPEAL AND ERROR—Continued.

Drains and Sewers—Continued.

through the lands of another, where none of the evidence is certified on writ of error by defendant, it will be presumed that a proper case was made out. Hodges *v.* Richmond Cedar Works, 492.

The statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal. Hodges *v.* Richmond Cedar Works, 492.

Evidence.—Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. Conrad *v.* Ellison-Harvey Co., 458.

Exceptions and Objections.—Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. Conrad *v.* Ellison-Harvey Co., 458.

It was urged by the defendant, that as the action was based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contained only the common counts in assumpsit; and, that, therefore, his action must fail. Held: That as this point was not made in the lower court, it could not be successfully raised for the first time in the appellate court. Conrad *v.* Ellison-Harvey Co., 458

Exceptions, Bill of.—See EXCEPTIONS, BILL OF.

Expert and Opinion Evidence.—Where there was no objection to the testimony of a witness on the ground of his incompetency to testify as an expert, the credibility and weight to be given his testimony are solely for the jury. C. & O. R. Co. *v.* Hunter's Admr., 699.

Forma Pauperis.—Section 3538, Code of 1904, provides that, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party."

Held: That this section does not apply to appellate proceedings. Tyler *v.* Garrison, 697.

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APPEAL AND ERROR—Continued.

Harmless Error.—See *infra*, "Adverse Possession."

Damages.—In an action for personal injuries, the jury were instructed that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries." There was evidence that plaintiff was in the hospital for three weeks, and thereafter for six weeks he was only able to spend a part of each day at his place of business. It did not appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence. The instruction was held not prejudicial error warranting a reversal where the other elements of damage were all properly set out. Virginia Railway, etc., Co. *v.* Hill, 397.

When an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But this general rule will not be carried so far as to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, "De minimis lex non curat." Virginia Railway, etc., Co. *v.* Hill, 397.

Failure to Instruct as to Burden of Proof.—In an action for personal injuries against a railroad company, the court, through inadvertence, failed to read an instruction to the jury, referring to the burden of proof, which the court at the request of the defendant intended to read. The court certified, however, that the case was argued before the jury by the opposing attorneys upon proper assumptions as to the burden of proof as stated in the instruction. Held: That while such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, yet as it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof, there is no reason to suppose that the railroad company was injured by the inadvertence of the judge. A. C. L. R. Co. *v.* Church, 725.

General Rule.—Since the act of March 27, 1914 (Acts 1914, ch. 331, p. 641), this court should extend the doctrine of harmless error to its logical conclusion, namely, that error is harmless which does not injuriously affect the interests of the party complaining, and that such injury is not presumed, but must affirmatively appear from the record; for that act

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APPEAL AND ERROR—Continued.

Harmless Error—Continued.

General Rule—Continued.

in simple and unambiguous language directs the courts, at every stage of the proceeding, to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

In this court the doctrine of harmless error has been frequently announced and enforced in many cases where there has been a misdirection of the jury, a refusal to grant proper instructions, where evidence has been illegally admitted, and where there have been mistakes and errors in pleading. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Introduction of Evidence.—In an action by a servant for personal injuries sustained while working upon a trestle, there was no mention of ice in the declaration but the evidence showed the formation of ice on the trestle. After plaintiff had rested defendant moved to exclude the evidence in regard to the ice. The jury were instructed: "The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury they must find for the defendant." Held: Under these circumstances there was no error in the action of the court in this regard. Danville *v.* Lipford, 280.

Many years prior to the fire plaintiffs had the complete equitable title to the property destroyed. Defendant excepted to the introduction of a deed to plaintiffs made after the action was brought. Held: That the action of the beneficial owner to recover damages for injury to the property by fire could have been maintained as well without the deed as with it. So that, even if the deed was erroneously admitted, the error was harmless. C. & O. R. Co. *v.* May, 790.

Instructions.—Error in giving or refusing to give instructions.—See INSTRUCTIONS.

Where instructions are contradictory and inconsistent, but the erroneous instructions were granted by the court at the instance of the party complaining of the instructions, he can not complain of that as error which could not possibly have injured his cause. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Invited Error.—Where instructions are contradictory and inconsistent, but the erroneous instructions were granted by the court at the instance of the party complaining of the in-

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APPEAL AND ERROR—Continued.

Invited Error—Continued.

structions, he can not complain of that as an error which could not possibly have injured his cause. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Judicial Sales and Rentings.—*Effect of Reversal of Decree.* See JUDICIAL SALES AND RENTINGS.

Municipal Corporations.—See *infra*, "Annexation of Territory."

Negligence.—See *infra*, "Contributory Negligence."

New Trials.—See NEW TRIALS.

Order of Proof.—Reopening the case is within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. Virginia R. & P. Co. *v.* Gorsuch, 655.

Petition for Appeal.—A petition for a writ of error is a pleading, and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered. Ewell *v.* Brock, 475.

Pleading.—A petition for a writ of error is a pleading. Ewell *v.* Brock, 475.

Record.—Although counsel for the defendant suggested in his brief and in the oral argument that the record before the court was inadequately and imperfectly made up and was not just to the defendant, it is obvious that the court must dispose of the case on the record as it came before it. Brenard Mfg. Co. *v.* Brown, 757.

Remittitur.—See REMITTITUR.

Reopening Case.—Matters of this sort are within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. Virginia R. & P. Co. *v.* Gorsuch, 655.

Reversible Error.—See *infra*, "Harmless Error."

Must Be Manifest and Apparent of Record.—Where the question of contributory negligence was properly submitted to the jury under well-established principles, a mere doubt as to whether the jury decided the question properly is plainly insufficient to justify a reversal of the judgment. Richmond *v.* McCormack, 552.

Variance.—Section 3384 of the Code of 1904, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation

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APPEAL AND ERROR—Continued.

Variance—Continued.

as would have been presented in the trial court if the question first raised on appeal had been raised there. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant can not upon appeal take advantage of the irregularity which the statute would have cured. Conrad *v.* Ellison-Harvey Co., 458.

Verdict Contrary to or Against Weight of Evidence.— See NEW TRIALS.

APPROACHES. See BRIDGES.

APPROPRIATION ACTS. See STATE.

ARREST OF JUDGMENT. See JUDGMENTS AND DECREES.

ASSESSMENT. See TAXATION.

ASSIGNMENT OF ERRORS.

Waiver.—An assignment of error to the improper admission of evidence, and of evidence "of a character so intangible as to be not capable of being rebutted," but which does not call attention to any particular evidence as improperly admitted, and which has not been argued, either orally or in briefs, must be regarded as waived. Warwick County *v.* Newport News, 177.

ASSUMPSIT.

Consideration.—A valid and sufficient consideration, either of benefit moving from, or of detriment to (in change of status of), the plaintiff, is absolutely essential to support the action of assumpsit in all three classes of cases enumerated above. Norfolk *v.* Norfolk County, 356.

What is sufficient consideration. Norfolk *v.* Norfolk County, 356.

Demurrers.—A demurrer will not lie to a common law count in assumpsit. Norfolk *v.* Norfolk County, 356.

Equity.—See *infra*, "Nature is Equitable."

Fraud and Deceit.—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. Norfolk *v.* Norfolk County, 356.

Implied Promise.—Fiction of implied promise will not be indulged in every case. Norfolk *v.* Norfolk County, 356.

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ASSUMPSIT—Continued.

Implied Promise—Continued.

Where defendant relies upon a bona fide hostile claim or right. Norfolk *v.* Norfolk County, 356.

Master and Servant.—Upon a wrongful discharge of a servant his appropriate remedy is assumpsit. Conrad *v.* Ellison-Harvey Co., 458.

Mistake.—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. Norfolk *v.* Norfolk County, 356.

Money Had and Received.—Classes of cases in which the action of assumpsit properly lies for the recovery of money. Norfolk *v.* Norfolk County, 356.

In what cases the action lies. Norfolk *v.* Norfolk County, 356.

Municipal Corporations.—Action by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

Nature is Equitable.—An action of assumpsit upon a quasi-contract—which is the action in the instant case—is equitable in its nature. No recovery will be allowed in such an action which does violence to natural equity. Grice *v.* Todd, 481.

Privity.—Norfolk *v.* Norfolk County, 356.

Warranty.—Either an action on the case sounding in tort or assumpsit will lie for a false warranty. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

When the Action Lies.—Assumpsit lies in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex aequo et bono* it belongs to the plaintiff. Norfolk *v.* Norfolk County, 356.

Cases in which the action of assumpsit properly lies for the recovery of money. Norfolk *v.* Norfolk County, 356.

Plaintiff may recover whenever, but for mistake or fraud, he would have had unquestioned right to the money. Norfolk *v.* Norfolk County, 356.

Privity in fact. Norfolk *v.* Norfolk County, 356.

Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. Norfolk *v.* Norfolk County, 356.

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ASSUMPSIT—Continued.

When the Action Lies—Continued.

Where the defendant received the money by a right which is independent in its origin from the original right of the plaintiff and in no way goes upon or displaces the latter, the recovery is properly denied. In such case the express facts negative any possibility of a promise of defendant to pay plaintiff anything, and equally negative any privity between their claims of right to the fund. Furthermore, no consideration exists to support the action. Norfolk *v.* Norfolk County, 356.

ASSUMPTION OF RISK. See MASTER AND SERVANT.

ATTORNEY AND CLIENT.

Privileged Communications.—No communication to a lawyer for the express purpose of having it brought to the attention of the public, or communicated to another, is privileged. Stein *v.* Morris, 390.

Plaintiff communicated a scheme of banking to defendant, and defendant united with plaintiff in an effort to organize a company to carry the scheme into effect, but the effort was a failure. The scheme was not committed to defendant in confidence; on the contrary, the very thing he was asked to do necessarily involved his discussing plaintiff's plan and making it known to the public. It was held that there was no violation by the defendant of professional confidence when the defendant eventually established a scheme somewhat similar. Stein *v.* Morris, 390.

AUTOMOBILES.

Appeal and Error.—Bohannon-King Co. *v.* Vellines, Admx., 428.

Collision.—Administratrix's decedent was killed, while riding a bicycle, in a collision with an automoblie. There was conflict in the testimony as to the speed of the automobile, the precise location of the accident, the conduct of the decedent, and every other material fact in issue. The jury, as judges of the weight of the testimony, had the right to believe that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper lookout; that the machine was going at an excessive rate of speed; that if the driver had been keeping a proper lookout and controlling the machine, he could have avoided the accident, even after the peril of the decedent was discovered; and that, if he had been keeping a proper lookout and had made a proper turn, there would have been no accident. Under these circumstances, and under the mandatory provisions of the statute, requiring

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AUTOMOBILES—Continued.

Collision—Continued.

the court to consider such cases as upon a demurrer to the evidence, there was no reversible error in the refusal of the court below to set aside the verdict on the ground that it was contrary to the law and the evidence. Bohannon-King Co. *v.* Vellines, Admx., 428.

Collision with Street Railway Car.—See STREET RAILROADS.

Contributory Negligence.—The wife owned an automobile. Her husband at work in another city from his home borrowed it from her. The husband had had possession of the automobile for about a week when his wife visited him, and while riding in the automobile driven by her husband was injured in a collision with a street car. The wife was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time with a guest. Held: That the negligence, if any, of her husband, could not be imputed to her, and that she was herself guilty of no negligence. Virginia R. & P. Co. *v.* Gorsuch, 655.

Imputable Negligence.—The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. Virginia R. & P. Co. *v.* Gorsuch, 655.

The negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. Virginia R. & P. Co. *v.* Gorsuch, 655.

BAILMENTS.

Imputable Negligence.—The negligence of a bailee of property, over whom the bailor is exercising no control at the time of the injury, is not imputable to the bailor. Virginia R. & P. Co. *v.* Gorsuch, 655.

BANKRUPTCY AND INSOLVENCY.

Foreign Insurance Company.—See INSURANCE.

Jurisdiction.—Upon the insolvency of a foreign insurance company, the proper place for a settlement between the company and its general agent for two States is in the suit in its home State for general liquidation of the company's business, and not in an ancillary proceeding in one of the other States. Johnson *v.* Button, 339.

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BANKS AND BANKING.

Deposit.—See *infra*, "Joint Deposit;" "Relation Between Bank and Depositor."

Discount.—The reserving of a discount by a bank is not a payment by the debtor of interest on the loan. Baker *v.* Lynchburg Nat. Bank, 208.

Joint Deposit.—Money of M. was deposited in a bank on savings account to the credit of M. or E. Held: That upon the death of M. the balance of such account belonged to E. Deal's Adm'r *v.* Merchants, etc., Bank, 297.

National Banks.—Usury. See USURY.

Relation between Bank and Depositor.—The relation between a bank and a depositor is that of debtor and creditor. The deposit creates an ordinary debt, not a privilege or right of a fiduciary character. It is a loan with the superadded obligation that the money is to be paid when demanded by check. Deal's Adm'r *v.* Merchants, etc., Bank, 297.

Taxation.—The act of February 28, 1890 (Acts 1889-90, p. 111), amended by Acts 1902-3-4, p. 431 (section 1040-a of Code, 1904), providing for the taxation of shares of stock issued by banks located in counties and cities is constitutional. Tresnon *v.* Supervisors, 203.

The bank act, Acts 1915, p. 209, and section 1040-a, Code 1904, are harmonious, and, when read together, constitute the law of the State touching the assessment and taxation of shares of bank stock. Under these acts shares of stock in city banks owned by residents of a county are properly taxable in the county. Tresnon *v.* Supervisors, 203.

The uniformity requirement of section 168 of the Constitution is not affected by the fact that stock in a city bank is taxed by the city against resident holders thereof at a higher rate than it is taxed by an adjacent county against residents of such county. Tresnon *v.* Supervisors, 203.

Usury.—See USURY.

BASTARDY.

Slaves.—Construction of act of February 27, 1866, Code of 1904, section 2227, invalidating slave marriages and legitimatizing the issue thereof. Francis *v.* Tazewell, 319.

Neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children. Francis *v.* Tazewell, 319.

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BICYCLE.

Action for injury incurred in collision between automobile and bicycle. Bohannon-King Co. *v.* Vellines, Admx., 428.

BILL IN EQUITY. See EQUITY.

BILLS, NOTES AND CHECKS.

Agreement Changing Ordinary Liability.—A note was signed by a Farmers Mutual Exchange and appellants. Appellants testified that they signed the note with the understanding that none of them should be liable until it was brought back to them for their endorsement, and that it was to be entirely optional with them to place their names on it or not, as they might finally prefer. This testimony was objected to by the appellee, a bank, the holder of the note in due course, who under the evidence was warranted in treating appellants as endorsers. Held: The objection was well taken, as a holder of the note in due course could not be affected by such an understanding. Colona *v.* Parksley Nat. Bank, 812.

Assignment as Collateral.—Subsequent to the assignment of the note as security for overdrafts, the maker gave the bank written instructions to place the note to its credit. Held: That this in no way invalidated the endorsement previously made by the assignment. The original endorsement completed the title of the bank as a bona fide holder of the note, and it was perfectly competent for the maker and the bank to thereafter agree to change the original purpose for which the transfer was made. Colona *v.* Parksley Nat. Bank, 812.

The fact that the note was assigned as collateral security did not make the transfer any the less effective. It is settled in Virginia that such a transfer constitutes the transferee a holder in due course. Colona *v.* Parksley Nat. Bank. 812.

Blanks.—See *infra*, "Filling Blanks."

Burden of Proof.—See *infra*, "Presumptions and Burden of Proof."

Collateral.—See *infra*, "Assignment as Collateral."

Consideration.—Under section 24 (Code 1904, section 2841-a) of the negotiable instruments law of Virginia, a deed of trust and notes secured by it are *prima facie* evidence of a valuable consideration, in the absence of affirmative evidence of lack of consideration. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Sufficiency of consideration. See *infra*, "Sufficiency of Consideration."

Delivery.—Upon suit to enforce a deed of trust the delivery or nondelivery of the notes secured by it is immaterial. The deed of trust is in itself sufficient evidence of the existence

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BILLS, NOTES AND CHECKS—Continued.

Delivery—Continued.

of the debts, in the absence of any proof of their payment subsequent to its delivery. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Documentary Evidence.—The minutes of the meetings of the board of directors of a Farmers Exchange, and copies of correspondence obtained from its files, relating directly or indirectly to the note in question, were admissible in an action against the endorsers, all of whom were stockholders or directors of the Exchange. Colona *v.* Parksley Nat. Bank, 812.

Endorsement.—See *infra*, "Indorsement."

Extension of Time to Principal.—*Burden of Proof.*—Where the defense to an action on a negotiable instrument is a release by such an agreement, the burden of proving the existence of the agreement rests upon the defendant. Cape Charles Bk. *v.* Farmers Mut. Ex. 771.

Existence of Agreement a Question of Fact.—In every case where the existence of an agreement such as mentioned in the statute is relied on by a person secondarily liable as a discharge of such liability, the question of the existence of such an agreement is a mixed question of law and fact; and when the mutual agreement is to be gathered from the acts of the parties, their situation and the surrounding circumstances, it is for the jury to determine what were the intention and understanding upon which the minds of the parties met. If the facts and circumstances are all ascertained, whether they constitute such an agreement is, of course, a question of law for the court. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

General Rule.—By the common law and the negotiable instruments law, Code of 1904, section 2841, sub-section 120, sub-division 6, a party secondarily liable on a negotiable instrument is released, "By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Payment of Interest in Advance.—The instant case was not submitted on the bare facts of payment and acceptance of interest in advance. All the officers of the plaintiff and its assignor bank testified in rebuttal of the *prima facie* case which such payment and acceptance might otherwise have made out. This and the evidence as to the situation of the parties, their relations to each other and the surrounding cir-

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BILLS, NOTES AND CHECKS—Continued.

Extension of Time to Principal—Continued.

Payment of Interest in Advance—Continued.

cumstances warranted the jury in finding that there was not in fact any meeting of the minds of the maker and holders of the note sued on upon any agreement to extend the time of payment or to postpone the right to enforce the note sued on. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

While payment and acceptance of interest in advance is not in itself an agreement to extend the time of payment of the obligation on which the interest is paid, yet it is evidence tending to prove the existence of such an agreement, and in the absence of any other evidence bearing upon the negative of the question, such payment and acceptance of interest affords *prima facie* evidence of the existence of such an agreement. However, when there is other evidence such as the acts, situation of and circumstances which surround the parties, but slight evidence to the contrary will rebut the prima facie case made by the evidence of payment and acceptance of interest in advance. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

What Constitutes Such an Agreement.—The agreement in question contemplated by the above statute and by the rule at common law which it enacts, need not be express. It may be implied from acts, declarations, facts and circumstances. Its form is immaterial. It may be by parol as well as in writing. It must, however, be a binding contract, enforceable at law or in equity. It must be supported by a valuable consideration. It must be for a definite period, however short. When implied in law it is still a contract in fact and not in law, and hence an actual meeting of the minds of the contracting parties is essential to such an agreement, to bring it within the operation of the statute and common law rule. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Filling Blanks—*Authority to Fill—Case at Bar.*—In the instant case, the defendant—the person who signed and delivered the incomplete instrument, in order that it might be converted into a negotiable instrument—introduced no evidence, nor was there any in the case, to rebut the *prima facie* authority of the plaintiff, the holder for value, to complete the instrument given by the statute. Hence in the instant case, such authority is the same in effect as if it had been absolute, as at common law. Brown *v.* Thomas, 763.

Authority to Fill Prima Facie or Absolute.—At common law before an incomplete instrument was negotiated to a

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BILLS, NOTES AND CHECKS—Continued.

Filling Blanks—Continued.

Authority to Fill Prima Facie or Absolute—Continued.

holder for value—before the consideration of the note passed—the authority to complete it was *prima facie* only. But after this occurrence in its history, the authority to complete the note became, at common law, absolute. The statute in Virginia (negotiable instruments law, sub-section 14, section 2841-a, Code 1904) makes the authority under consideration *prima facie* only, after, as well as before, the occurrence next above referred to. It allows, at the trial, in a case such as first above stated, the defense that the blanks were not filled up in accordance with the authority given to the person into whose hands the incomplete instrument was delivered. This was a very important change in the common law on this subject and very far-reaching in its effect. Brown *v.* Thomas, 763.

Reasonable Time—Case at Bar.—A blank note was endorsed by defendant and delivered to his brother, who signed it and delivered to the plaintiff to secure the payment of any notes that plaintiff might subsequently endorse for defendant's brother. Upon the day after the death of the defendant's brother, insolvent, the plaintiff filled up the blanks and completed the note. As it was not until the brother's death that it could be determined that plaintiff might not be asked by him and consent to endorse other notes for him, the note could not have been completed before the brother's death. and have accomplished the purpose for which it was delivered to the plaintiff. It is clear, therefore, that in the instant case, the note was completed within a reasonable time. Brown *v.* Thomas, 763.

Reasonable Time—Questions of Law and Fact.—What is a reasonable time in such a case is usually a question for the jury, when the facts are doubtful or disputed. But when the facts are clearly established, or undisputed, or admitted, the reasonable time is a question of law. The demurrer to evidence in the instant case avoids any controversy as to the facts. When the facts thus ascertained are such that reasonable minds could draw but one conclusion therefrom, it is for the court to draw that conclusion as a matter of law. Brown *v.* Thomas, 763.

Rule at Common Law.—The rule at common law was that, if, at the time an incomplete instrument was negotiated to a holder for value, the latter was without notice of any limitation upon the authority to complete the instrument, other

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BILLS. NOTES AND CHECKS—Continued.

Filling Blanks—Continued.

Rule at Common Law—Continued.

than was given by the incomplete instrument itself, the person who signed the incomplete instrument, either as maker or indorser, and delivered it, in order that it might be converted into a negotiable instrument, was not allowed thereafter to defend an action against him on the instrument upon the ground that the blanks were not filled up in accordance with the authority he may have given to the person into whose hands he delivered the incomplete instrument. That is to say, in such case, the authority in any holder for value of such an instrument, to complete it, was absolute. Brown *v.* Thomas, 763.

Time Within Which Blanks Must Be Filed.—Both at common law and by virtue of the express provisions of the statute in Virginia, the blanks in an incomplete negotiable instrument must be filled within a reasonable time in order to hold the maker or endorser. Brown *v.* Thomas, 763.

General Issue.—It was urged by defendant that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure of consideration. Held: That this defense, if sound, could be availed of under the general issue; but that to adopt this contention would be to make a new contract for the parties. There was no evidence of any agreement to increase the defendant's sales, except as set forth above; and the defendant could not prevent the collection of his notes by setting up the plaintiff's failure to comply with a situation which was induced by his own misrepresentation of a material fact. Brenard Mfg. Co. *v.* Brown, 757.

Illegality or Failure of Consideration.—Defendant purchased from plaintiff under a written contract a copyrighted advertising plan and certain goods and supplies to be used in connection therewith, giving his notes in payment therefor. Plaintiff gave his bond to secure a refund to defendant, if defendant's sales were not increased in the following year to a certain fixed sum. But this agreement for a refund in case defendant's sales were not increased to the named sum were based on a representation of defendant as to sales the past year which was admittedly false. Held: That in an action on the

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BILLS, NOTES AND CHECKS—Continued.

Illegality or Failure of Consideration—Continued

notes there was no merit in the defense and that defendant's sales did not reach the sum named in the contract. Brenard Mfg. Co. *v.* Brown, 757.

It was urged by defendant that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure of consideration. Held: That this defense, if sound, could be availed of under the general issue; but that to adopt this contention would be to make a new contract for the parties. There was no evidence of any agreement to increase the defendant's sales, except as set forth above; and the defendant could not prevent the collection of his notes by setting up the plaintiff's failure to comply with a stipulation which was induced by his own misrepresentation of a material fact. Brenard Mfg. Co. *v.* Brown, 757.

Indorsement.—*Evidence of Agreement Among Endorsers.* See *infra*, "Agreement Changing Ordinary Liability."

Place of Signature.—The endorsement, as its derivation and meaning would indicate, is generally made by writing the transferer's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name. The position of the signature of an endorser upon a negotiable note is not in itself conclusive of the purpose of the signature. This is expressly recognized in section 2841-a, subsection 17, clause 6, Code of 1904, which provided that where a signature is so placed upon an instrument that it is not clear in what capacity the person signing the same intended to sign, he is to be deemed as endorser. Undoubtedly, the names of endorsers usually appear on the back of the paper, but they may appear elsewhere without offending against the regularity required by the negotiable instruments law. Colona *v.* Parksley Nat. Bank, 812.

Separate Paper.—Where the maker of a note forwarded it to a bank accompanied by a letter, in which it was stated that the maker did assign and deposit the note as collateral security to secure the bank against any loss by overdraft of the maker, the signature of the maker to the letter of assignment was a sufficient endorsement under Code of 1904, section 2841-a, sub-section 31, which provides: "The endorsement must be written on the instrument itself or upon a paper attached thereto." Colona *v.* Parksley Nat. Bank, 812.

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BILLS, NOTES AND CHECKS—Continued.

Indorsement in Blank.—See *infra*, "Filling Blanks."

Liability of Maker.—Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than those who purchase such paper in due course of commercial transactions. Colona *v.* Parksley Nat. Bank, 812.

Payment.—See *infra*, "Extension of Time to Principal."

Payment of Interest in Advance.—See *infra*, "Extension of Time to Principal."

Pledge and Collateral Security.—See *infra*, "Assignment as Collateral."

Power of Attorney to Confess Judgment.—See CONFESSION OF JUDGMENTS.

Presumptions and Burden of Proof.—Where the defense to an action on a negotiable instrument is a release by an extension of time to principal, the burden of proving the existence of the agreement rests upon the defendant. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Questions of Law and Fact.—Existence of an agreement to extend time to principal. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Particular facts held to constitute a reasonable time. Brown *v.* Thomas, 763.

What is a reasonable time within which to fill blanks. Brown *v.* Thomas, 763.

Reasonable Time.—Blanks must be filled within a reasonable time. Brown *v.* Thomas, 763.

Code of 1904, section 2841-a, sub-section 53, provides that "when an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course." What is a reasonable time for any purpose depends always upon the facts of the particular case. In the case at bar, a note dated August 24, 1911, payable on demand, was not discounted until October 31, 1911. The note was given in anticipation of its use to raise money for the purpose of handling the season's crops, when and as such use might be necessary. Held: That there was no unreasonable delay in negotiating the note. Colona *v.* Parksley Nat. Bank, 812.

Regularity.—Appellants were members of a Farmers Mutual Exchange. Anticipating that the approaching crop season would call for money with which to handle the crops of its members a committee was appointed to solicit endorsers for

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BILLS, NOTES AND CHECKS—Continued.

Regularity—Continued.

a loan. A note was prepared and sent out from the office of the Exchange. The body of the note and the signature of the Exchange appeared in type; then followed the names of twenty individual members (appellants), some immediately under the signature of the maker and some in another column to the left. It was contended that the note showed upon its face that it was invalid because it appeared to be signed by the Exchange and appellants as joint makers, payable to the order of themselves and not endorsed by them. Held: That the substance and essence of the transaction as a whole did not, as against the bank, the holder in due course, justify this contention. The appellants manifestly did not at any time mean to become bound otherwise than as endorsers. Colona *v.* Parksley Nat. Bank. 812.

Sufficiency of Consideration.—The sale of a scheme of advertising is an ample consideration for the notes given in payment thereof. Although the scheme contemplated giving away the articles of merchandise as premiums or prizes, yet these articles and the services furnished by the plaintiff in connection with the advertising scheme, represented property and value. Brenard Mfg. Co. *v.* Brown, 757.

BILL OF EXCEPTIONS. See EXCEPTIONS, BILL OF

BLANKS. See BILLS, NOTES AND CHECKS.

BONDS.

Taxation.—The tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages. Virginia Blue Ridge Ry. *v.* Kidd, 426.

BOUNDARIES.

Adverse Possession.—Defense of adverse possession in proceedings to ascertain boundaries under act of March 4, 1912. Christian *v.* Bulbeck, 74.

Where a party takes and holds actual possession beyond his true boundary line, and with good faith, though mistaken, claims title to and occupies the land. Christian *v.* Bulbeck, 74.

Where the party occupied and possessed the land in controversy through a misapprehension or mistake as to his boundary, with no intention to claim what did not belong to him. Christian *v.* Bulbeck, 74.

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BOUNDARIES—Continued.

Adverse Possession—Continued.

Where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line of the ground. Christian *v.* Bulbeck, 74.

Ejectment.—Right of party to proceed under the act of March 4, 1912, instead of bringing ejectment. Christian *v.* Bulbeck, 74.

Evidence as to Boundaries.—A plat not referred to in or made a part of the chain of title of either plaintiff or defendants, on the trial of a petition under Acts 1912, p. 133, is not admissible as evidence of the extent or location of the metes and bounds covered by the true title, or of that covered by the color of title of the defendants. Christian *v.* Bulbeck, 74.

Jury.—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. Collier *v.* Hiden, 453.

Mistake.—Where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line of the ground. Christian *v.* Bulbeck, 74.

Whether adverse possession exists where a party occupies land through a mistake as to his boundary. Christian *v.* Bulbeck, 74.

Monuments as Controlling Courses and Distances.—An instruction that "a correspondence in quantity given by a line in question with the quantity mentioned in the deed, or in the approximation thereto, may be considered as going to establish such line as the true one," gives too great prominence to the mere acreage. It is of less weight than natural monuments, corners or reputed boundaries. Christian *v.* Bulbeck, 74.

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BOUNDARIES—Continued.

Monuments as Controlling Courses and Distances—Continued.

Distance or length of lines called for in deeds and acreage must give way to fixed and ascertained corners and reputed boundaries established by ancient but distinct land marks. Christian *v.* Bulbeck, 74.

Statute Regulating Procedure to Determine.—Act of March 4, 1912.

Evidence as to Boundaries.—See *infra*, "Evidence as to Boundaries."

Jury Trial.—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. Collier *v.* Hiden, 453.

Remaindermen.—Under Acts of Assembly of 1912, p. 133, where the petitioner has only a life estate he must either have the remaindermen unite with him as plaintiffs, or have them made defendants. Collier *v.* Hiden, 453.

The defense of adverse possession for the statutory period may be set up as a defense to a petition under the act. Christian *v.* Bulbeck, 74.

Title of Plaintiff.—Plaintiff must recover upon the strength of his own title. Christian *v.* Bulbeck, 74.

Title to Land.—The act confers upon the court jurisdiction to pass upon the title to the land included in the boundary line or lines fixed by the judgment of the court. Christian *v.* Bulbeck, 74.

Where plaintiff's title was a fee, and the controversy was between the owners of coterminous real estate as to the location of boundary lines, plaintiff had the right to proceed under the statute instead of by ejectment. Christian *v.* Bulbeck, 74.

BRIDGES.

Approaches.—See *infra*, "Dedication;" "Presumption and Burden of Proof."

Dedication.—A city sought to show a dedication to the public of an approach to a bridge owned by a public service corporation. The approach in question was indispensable to the use of the bridge and the company's control of it was essential to the discharge of its duty to the public. Therefore, the

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BRIDGES—Continued.

Dedication—Continued.

company could not expressly have dedicated the approach unqualifiedly to the city, because such dedication would have been in derogation of its charter obligation to the community at large and ultra vires and not binding upon the corporation. If this be so with respect to an express dedication, a fortiori must it be true of a dedication sought to be established by implication merely. Richmond *v.* Mayo Land & Bridge Co. 545.

The approach to a bridge, being an essential and inseparable part of it, can not be dissevered, since that would deprive the public service corporation of the means of performing a non-delegable duty which it owes to the public. Richmond *v.* Mayo Land & Bridge Co., 545.

The lawfulness of a dedication, like the constitutionality of a law, must depend not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication. Therefore, where a city has power under its charter to close its streets, a public service bridge company can not dedicate to the public as a street the approaches to its bridge. Richmond *v.* Mayo Land & Bridge Co., 545.

Where a city seeks to show the dedication of an approach to a bridge clear proof of such dedication is required. Richmond *v.* Mayo Land & Bridge Co., 545.

Presumptions and Burden of Proof.—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old bridge with its approaches as a location for the new bridge. Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it. Richmond *v.* Mayo Land & Bridge Co., 545.

Street Railroads.—*Right to Operate Upon City Bridge.*—A street railway was authorized by an ordinance to operate on Fourteenth street (among others) to the city limits. In consideration of the privileges granted the street railway agreed to pay the city a percentage of its gross receipts. At the south end of Fourteenth street was a bridge which with its approach at the time of the passage of the ordinance was owned by a public utility company. The bridge while thus owned was popularly known as Fourteenth street, and the company operated its railway over the approach and bridge to the city limits. Under the statutes regulating the power of eminent domain the city condemned this bridge and its approach and

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BRIDGES—Continued.

Street Railroads—Continued.

built a new bridge across the river. Held: That the city had no right to impose a rental or toll charge upon the street railway for the use of the new bridge, and this notwithstanding that the statute authorizing the construction of bridges by the city contained a provision that the city might require compensation of transportation companies for the use of the bridges, and notwithstanding that the company by its charter was subject to all reasonable restrictions, limitations or agreements in operating its railway over bridges across the river imposed by the owners of the bridges. City of Richmond *v.* Va. Ry. & P. Co., 802.

Streets and Highways.—As a general proposition bridges, constituting extensions of streets, or connecting streets, are to all intents and purposes parts of such streets. City of Richmond *v.* Va. Ry. & P. Co., 802.

BUILDING CONTRACTS.

Contract for Pavement of Street.—See STREETS AND HIGHWAYS.

BURDEN OF PROOF. See PRESUMPTION AND BURDEN OF PROOF.

BURGLARY.

Evidence.—*Exclusive Possession of Stolen Goods.*—The stolen property was found in the kitchen of a house in which accused rented a room. The Commonwealth proved that the accused had access thereto, but did not prove that he was the only person that had such access. It was held that exclusive possession by accused of the stolen property was not shown. Tyler's Case, 868.

Possession of Stolen Goods.—Upon being asked permission by another to wear the stolen property, the accused replied, "All right, I don't care if you do." It was held that this reply of the accused was not sufficiently distinct and unequivocal in meaning to prove, with that degree of certainty required in a criminal case, an assertion of property by the accused in the stolen article. It was consistent with a claim of ownership on the part of accused, but was also consistent with a position of indifference. Tyler's Case, 868.

Presumptions and Burden of Proof.—*Presumption from Possession of Stolen Goods.*—The burden rests upon the Commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession. Tyler's Case, 868.

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BURGLARY.—Continued.

Presumptions and Burden of Proof—Continued.

The possession of stolen goods contemplated by the rule above referred to is an exclusive possession on the part of the accused; otherwise such rule is not applicable. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. Tyler's Case, 868.

The possession of stolen goods is, of itself, not even prima facie evidence of housebreaking or of burglary. Tyler's Case, 868.

Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of larceny, but extrinsic mechanical indications may constitute such additional evidence. Tyler's Case, 868.

BUSINESS.

Taxation.—When is a non-resident engaged in business within the State. Jamison *v.* Commonwealth, 137.

CARRIERS. See STREET RAILROADS.

Carriers of Live Stock.—What constitutes notice to a carrier of a claim for damages for failure to deliver stock within a reasonable time. Ches. & O. R. Co. *v.* Rebman, 71.

Where the bill of lading fixes a value upon live stock and provides that the shipper shall not recover a greater sum, the shipper can recover any damage less than such valuation resulting from negligent failure to deliver or delay in delivery, although he realized in the market more than the amount of such valuation. Ches. & O. R. Co. *v.* Rebman, 71.

Carriers of Passengers.—*Contributory Negligence.*—Contributory negligence in leaving conveyance. Virginia Trust Co. *v.* Raymond, 674.

Doctrine of last clear chance. Virginia Trust Co. *v* Raymond, 674.

Plaintiff accompanied, as care-taker, two new locomotives (dead engines) over the line of the defendant company. His fare as a passenger was paid, and he traveled in one of the

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CARRIERS—Continued.

Carriers of Passengers—Continued.

engines, both of which were being hauled on their own wheels as parts of a through freight train. Plaintiff inquired of the conductor when and where the train would stop, so as to give him an opportunity to oil his engine. The conductor replied that there would be frequent stops and plaintiff would have ample time to oil and inspect the engine. The train stopped for a moment on an automatic block signal. Plaintiff, without communicating with the train crew, within a minute after the train stopped, alighted from the cab of his engine and stood on the piston-rod, for the purpose of examining and oiling the engine. Held: That plaintiff was guilty of contributory negligence, which barred his recovery for injuries occasioned by the starting of the train while he stood upon the piston-rod. C. & O. R. Co. *v.* Jones, 784.

Injury to Fellow Passenger by a Drunken Passenger.—A carrier of passengers owes to all pasengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers. Where a passenger in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury complained of to the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident. Virginia R. & P. Co. *v.* Hubbard, 664.

A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen. Virginia R. & P. Co. *v.* Hubbard, 664.

Injury to Passenger.—Failing to give due opportunity to alight. Virginia Trust Co. *v.* Raymond, 674.

Street Railroads.—See STREET RAILROADS.

Interstate Commerce.—See INTERSTATE COMMERCE.

Limitation of Liability.—Common carriers may limit their liability in interstate commerce by regulations contained in their published tariffs filed with and approved by the Interstate Commerce Commission, and such regulations supersede State statutes and policies and furnish the exclusive rules for determining the carriers' liability. Western U. Tel. Co. *v.* Bolling, 413.

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CARRIERS—Continued.

Master and Servant.—See MASTER AND SERVANT.

Non-Assignable Duties.—See MASTER AND SERVANT.

Reasonable Time.—What constitutes notice to a carrier of a claim for damages for failure to deliver stock within a reasonable time. Ches. & O. R. Co. *v.* Rebman, 71.

Servant.—See MASTER AND SERVANT.

Telegraphs and Telephones.—The telegraph and telephone companies are common carriers. Western U. Tel. Co. *v.* Bolling, 413.

CASE. See TRESPASS ON THE CASE.

CHANCERY. See EQUITY.

Jurisdiction.—See JURISDICTION.

CHILDREN. See INFANTS.

CIRCUMSTANTIAL EVIDENCE.

Accident.—Whether proof of an accident may be circumstantial. General Accident, etc., Corp. *v.* Murray, 115.

CITIES. See MUNICIPAL CORPORATIONS.

COLLATERAL. See BILLS, NOTES AND CHECKS.

COLLISION. See AUTOMOBILES, STREETS AND HIGHWAYS.

COMMERCE. See INTERSTATE COMMERCE.

COMMISSIONER IN CHANCERY. See MASTER IN CHANCERY.

COMMISSIONER'S REPORT. See MASTER IN CHANCERY.

COMMONWEALTH. See STATE.

COMPROMISE.

Duress.—A contract of compromise, entered into with full knowledge of all the facts, cannot be set aside on the ground of duress when the other party has not been guilty of any unlawful act. The fact that one of the parties entered into such contract reluctantly, or was badly in need of money at the time, is not sufficient to constitute duress. Cary *v.* Harris, 252.

Where rescission is sought on the ground of fraud or duress such fraud or duress must be clearly shown. Cary *v.* Harris, 252.

Fraud and Deceit.—If a party makes a deliberate settlement of an alleged fraud, with his eyes wide open, such settlements will not be disturbed. Parties may settle frauds as well as

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COMPROMISE—Continued.

Fraud and Deceit—Continued.

anything else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a court. Cary *v.* Harris, 252.

Where rescission is sought on the ground of fraud or duress such fraud or duress must be clearly shown. Cary *v.* Harris, 252.

Rescission, Cancellation and Reformation.—Compromise agreements are favored and where their rescission is sought on the ground of fraud or duress such fraud must be clearly and convincingly shown. Cary *v.* Harris, 252.

CONCLUSIONS OF LAW. See LEGAL CONCLUSIONS.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN.

CONFESSION OF JUDGMENTS.

Power of Attorney to Confess Judgment.—A warrant of attorney contained in a note did not designate the person in whose favor the judgment was to be confessed. Held: A confession of judgment by an attorney under this warrant in favor of a bank, the holder of the note in due course, was valid, it appearing from the record and otherwise that before the judgment was taken the appellants all knew that the bank had the note, was looking to them for payment and had been notified by one of the endorsers to sue on the note. Colona *v.* Parksley Nat. Bank, 812.

CONSEQUENTIAL DAMAGES. See DAMAGES.

CONSIDERATION. See ASSUMPSIT; CONTRACTS.

Mortgages and Deeds of Trust.—See MORTGAGES AND DEEDS OF TRUST.

CONSTITUTIONAL LAW.

Appropriation Acts.—See STATE.

Bank Act.—The act of February 28, 1890 (Acts 1889-90, p. 111), amended by Acts 1902-3-4, p. 431 (section 1040-a of Code, 1904), providing for the taxation of shares of stock issued by banks located in counties and cities, is constitutional. Tresnon *v.* Supervisors, 203.

Commerce.—See INTERSTATE COMMERCE.

Construction of Statute by Court.—The constitutionality of a statute cannot be made to depend upon the construction put upon it by the court. If an act be constitutional upon its

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CONSTITUTIONAL LAW—Continued.

Construction of Statute by Court—Continued.

face, it cannot be made unconstitutional by an erroneous interpretation or an improper application of it by the court. C. & O. R. Co. *v.* May, 790.

Drains and Sewers.—The primary question of the public use and necessity of drainage rights in general has been determined by the legislature, and this will be controlling with the courts, in the absence of something to show a palpable want of foundation for the legislative pronouncement. Hodges *v.* Richmond Cedar Works, 492.

The Virginia drainage laws, embodied in sections 2576-2579, Code of 1904, are constitutional. Hodges *v.* Richmond Cedar Works, 492.

Due Process of Law.—*Taxation.*—Act of March 22, 1916, limiting time within which omitted taxes may be assessed. Com. *v.* United Cigarette M. Co., 835.

The act of March 22, 1916, referred to in the first headnote, is not unconstitutional as depriving the political divisions of the State of property without due process of law. The incipient right to assess omitted property, as conferred by section 508, Code 1904, does not fall within the meaning of a vested property right as recognized by the authorities. The mere existence of a general law which might have been availed of to reduce to a state of property an incomplete right affords to those who have not perfected their rights thereunder no ground for complaint against a change of the law. There must be something more than a mere expectation based upon anticipation of the continuance of present general laws. Com. *v.* United Cigarette M. Co., 835.

Ex Post Facto Laws.—*Ex post facto* laws relate to criminal proceedings which inflict punishments or forfeitures and not to civil proceedings which affect private rights retrospectively. Com. *v.* United Cigarette M. Co., 835.

Fires.—The act of the General Assembly (Acts 1908, p. 388), declaring the liability of railroads for damages from fires occasioned by sparks or coals dropped or thrown from an engine or train, is constitutional. C. & O. R. Co. *v.* May, 790.

Impairment of Obligation of Contracts.—*Act of March 22, 1916,* limiting time within which omitted taxes may be assessed. Com. *v.* United Cigarette M. Co., 835.

Franchises.—An ordinance granting the right to a company and imposing a corresponding duty to operate a street railway on the streets of a city, when accepted by the company, consti-

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CONSTITUTIONAL LAW—Continued.

Impairment of Obligation of Contracts—Continued.

tutes a binding contract, not subject to repeal, and protected against any impairment by the Constitution of the United States. City of Richmond *v.* Va. Ry. & P. Co., 802.

Interstate Commerce.—See INTERSTATE COMMERCE.

Power of Legislature.—The legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication. We look to the Constitution of the State, not for grants of power, but for limitations. When the prohibition is not found in the language of that instrument, or in its frame-work and general arrangement, there is no solid ground to pronounce the enactment void. The infractions must be clear and palpaple. Com. *v.* United Cigarette M. Co., 835.

Retrospective Law.—There are no constitutional inhibitions against the passage of retrospective laws as such. They are not favored by the courts, but to be invalid they must impair the obligation of contracts, destroy vested rights or fall within the definition of ex post facto laws. Com. *v.* United Cigarette M. Co., 835.

Separation of Legislative, Executive and Judicial Powers.—In all cases involving questions of constitutional restrictions the legislature necessarily, in the first instance, must determine for itself whether a contemplated act is constitutional, though ultimately it may become a judicial question to be decided by the courts. Nor is this primary determination by the legislature as to the validity of an act violative of the fundamental principle of republican government that legislative, executive and judicial power ought to be kept distinct and separate, except in so far as the action of one is intended to constitute a check upon the action of the others in the sense of keeping them within proper bounds. Commonwealth *v.* Ferries Co., 827.

Special or Private Laws.—Section 63, clause 9, of the Constitution of Virginia, prohibits the legislature from refunding by private act money lawfully paid into the treasury. But the Constitution imposes no limitation upon the power of the legislature to refund money unlawfully paid or collected. The fact that the Constitution in terms prohibits the one and is silent as to the other, creates a strong presumption that it was not intended to trench upon the absolute control of the legisla-

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CONSTITUTIONAL LAW—Continued.

Special or Private Laws—Continued.

ture in its management of the business of the State with respect to refunding money unlawfully paid into the treasury. Commonwealth *v.* Ferries Co., 827..

Taxation.—See TAXATION.

Taxation by Municipalities.—See MUNICIPAL CORPORATIONS.

CONSTRUCTION. See INTERPRETATION AND CONSTRUCTION.

CONTRACTS.

Assumpsit.—See ASSUMPSIT.

Consideration.—*Assumpsit.*—See ASSUMPSIT.

Failure of Consideration.—Defendant purchased from plaintiff under a written contract a copyrighted advertising plan and certain goods and supplies to be used in connection therewith, giving his notes in payment therefor. Plaintiff gave his bond to secure a refund to defendant, if defendant's sales were not increased in the following year to a certain fixed sum. But this agreement for a refund in case defendant's sales were not increased to the named sum were based on a representation of defendant as to sales the past year, which was admittedly false. Held: That in an action on the notes there was no merit in the defense and that defendant's sales did not reach the sum named in the contract. Brenard Mfg. Co. *v.* Brown, 757.

It was urged by defendant that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure of consideration. Held: That this defense, if sound, could be availed of under the general issue; but that to adopt this contention would be to make a new contract for the parties. There was no evidence of any agreement to increase the defendant's sales, except as set forth above; and the defendant could not prevent the collection of his notes by setting up the plaintiff's failure to comply with a stipulation which was induced by his own misrepresentation of a material fact. Brenard Mfg. Co. *v.* Brown, 757.

Sufficiency.—K., a retiring partner, had been of service to his partners in securing a government contract and giving necessary bond. He remained bound under both so far as the government and the surety company were concerned. These facts constituted abundant consideration for the $500 which

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CONTRACTS—Continued.

Consideration—Continued.

Sufficiency—Continued.

the partnership paid him upon a final settlement and termination of their relations with him as associate under the original contract. Clay's Adm'r *v.* Kelly, 437.

The contract of a partnership to pay K., a former member of the partnership, who had retired from it, a share of the profits upon his signing a contract of assignment by the partnership of a government contract, rested upon sufficient consideration. His signature resulted in both a benefit to the appellants and a risk to himself. Clay's Adm'r *v.* Kelly, 437.

A valuable consideration is a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it, to the party promised. Clay's Adm'r *v.* Kelly, 437.

Construction.—Duty of court to construe written instruments. Lawson *v.* Hobbs, 690.

Ejusdem Generis.—In the case in judgment, the contract provides that the defendant "shall not be held responsible or liable for any loss, damages, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages." Held: The words "or by any other cause which is unavoidable or beyond its reasonable control" should be restricted to causes of like nature with those enumerated, but the clause "or, in any event, for consequential damages" should not be so restricted, and the defendant should be exempt from "consequential damages" whether of like nature or not. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

The ejusdem generis rule is invoked only for the purpose of ascertaining the intent and meaning of the language under consideration, and should not be applied so as to do violence to the language employed in the instrument. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Under the ejusdem generis rule, applicable to the construction of written instruments, if a contract specifically enumerating losses from which a party is to be exempt is followed by words of general classification, the general words will be construed to mean other losses of the same kind as those enumerated. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Reference to Prior Contracts.—Where a contract refers to prior contracts, to which one of the parties was a party, for

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CONTRACTS—Continued.

Construction—Continued.

further particulars, it must be construed with reference to such prior contracts. Cary *v.* Holt's Ex'ors, 261.

Contract for Pavement.—See STREETS AND HIGHWAYS.

General Issue.—Whether the failure of consideration may be taken advantage of under the general issue. Brenard Mfg. Co. *v.* Brown, 757.

Guaranty.—See GUARANTY.

Illegal Contracts.—See ILLEGAL CONTRACTS.

Impairment of Obligation of Contracts.—See CONSTITUTIONAL LAW.

Interest.—*When Interest Allowed in Actions on Contracts.*—Section 3390 of the Code of Virginia is as follows: "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action, whether on contract or tort, the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which interest shall commence." The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon the general assumpsit. Under all the circumstances of the case, the statute above quoted applied, and the jury had the right, in their discretion, to fix the date from which the interest should begin to run. Consequently, a peremptory instruction of the lower court to the jury that if they found for the plaintiff they should allow interest from the time the plaintiff's demand accrued, under the terms of the contract, was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

In Minor's Inst., Vol. 4, part 1 (ed. 1878), p. 739, it is said that "when the action is founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. It is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor

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CONTRACTS—Continued.

Interest—Continued.

juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract." Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Interpretation and Construction.—See *infra*, "Construction."

Joint or Several Contracts.—An express contract of three of the beneficiaries of a trust estate to make the corpus of the estate a security for appellant's debt is a joint contract. Brown *v.* Ford, 233.

Obligation of Contracts.—See CONSTITUTIONAL LAW.

Promoter's Contract.—See CORPORATIONS.

Reformation.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Rescission.—See RESCISSION, CANCELLATION AND REFORMATION.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CORPORATIONS.

Dedication.—Property necessary to the performance of its duties by a public service corporation can not be dedicated. Richmond *v.* Mayo Land & Bridge Co., 545.

Directors.—See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Dividends—See STOCK AND STOCKHOLDERS.

Liquidation of Corporation.—See STOCK AND STOCKHOLDERS.

Minutes of Meeting as Evidence.—The minutes of the meetings of the board of directors of a Farmers Exchange, and copies of correspondence obtained from its files, relating directly or indirectly to the note in question, were admissible in an action against the endorsers, all of whom were either stockholders or directors of the Exchange. Colona *v.* Parksley Nat. Bank, 812.

Officers.—See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Promoters and Acts Prior to Incorporation.—A payment by appellant at the treasury for necessary expenses should be computed as an input of defendant in calculating the proportion of common stock to which he was entitled, although funds were received by the corporation because of the exercise of an option subsequent to the input and before the obligations became payable. Cary *v.* Holt's Ex'ors, 261.

Construction of a contract among promoters of a corporation to buy mining lands which determines their right in the stock of the company. Cary *v.* Holt's Ex'ors, 261.

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CORPORATIONS—Continued.

Promoters and Acts Prior to Incorporation—Continued.

Construction of promoter's contract. Cary *v.* Holt's Ex'ors, 261.

Letters of appellant to other promoters held not to estop him where he urged them to come and look into everything for themselves. Cary *v.* Holt's Ex'ors, 261.

Office rent and stenographer's hire as necessary expenses of the corporation. Cary *v.* Holt's Ex'ors, 261.

Purchasers of promoter's interest with knowledge of contract between promoters are charged with notice of his rights. Cary *v.* Holt's Ex'ors, 261.

Sale of promoter's interest. Cary *v.* Holt's Ex'ors, 261.

Where appellant was obligated by his contract to pay into the treasury of the corporation his proportion of all expenses incident to the successful carrying out of the purposes of the corporation, appellant's salary as president was such an expense. Cary *v.* Holt's Ex'ors, 261.

Stock and Stockholders.—See STOCK AND STOCKHOLDERS.

COSTS.

Appeal and Error.—It is unusual for the Court of Appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error. Williams *v.* Bond, 678.

Executors and Administrators.—It is unusual for the Court of Appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error. Williams *v.* Bond, 678.

Where upon the death of an executor and trustee his executor being charged under Code 1904, section 3419, with executing the trust, in good faith, brings suit to determine the rights of the beneficiaries and his own testator, he is entitled to his costs in the lower court and a reasonable allowance as an attorney's fee. Such a case presents an exception to the practice noted in the preceding syllabus. But as in the case at bar the executor was not the party substantially prevailing upon appeal, he was not entitled to costs in the appellate court. Williams *v.* Bond, 678.

Forma Pauperis.—Section 3538, Code of 1904, provides that, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any

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COSTS—Continued.

Forma Pauperis—Continued.

fees to them therefor, except what may be included in the costs recovered from the opposite party." Held: That this section does not apply to appellate proceedings. Tyler *v.* Garrison, 697.

COUNTIES.

Annexation of Territory.—See MUNICIPAL CORPORATIONS.

Taxation.—Action of assumpsit by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

COUNTS.

The count in a declaration is treated as partaking of the nature of the action. So that if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for a declaration to contain allegations sufficient to support it, either in tort or in assumpsit. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

COURTS. See JURISDICTION; QUESTIONS OF LAW AND FACT.

CRIMINAL LAW.

Burglary.—See BURGLARY.

Larceny.—See LARCENY.

CROSSINGS.

Abandonment of Highway.—A railroad track across a highway is itself a proclamation of danger, and travelers approaching such crossing on the highway must exercise proper precautions for their own safety. Even though the company may be guilty of negligence, the traveler can not recover if his own neglect to take such proper precautions proximately contributed to his injury. In order to constitute such proclamation of danger, however, the company should not do, or omit to do, anything which is likely to disarm the traveler and reassure him of his safety. The reason of the law fails if the tracks in fact and beyond all question have been abandoned. A. C. L. R. Co. *v.* Church, 725.

Concealed, dirt-covered, small and rusty rails, with undergrowth near the railroad track on a much-traveled dirt highway, are insufficient to justify the assumption that the railroad track had been abandoned; but when the impressions created by these indications of abandonment were confirmed

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CROSSINGS—Continued.

Abandonment of Highway—Continued.

by the absence of the warning sign, which is both customary and required by the statute, it can not be maintained as a conclusion of law that the court erred in submitting the question to the jury. A. C. L. R. Co. *v.* Church, 725.

Automobile Colliding with Street Car.—See STREET RAILROADS.

Collision of Street Car with Automobile.—See STREET RAILROADS.

Contributory Negligence.—A railroad track across a highway is itself a proclamation of danger, and travelers approaching such crossing on the highway must exercise proper precautions for their own safety. Even though the company may be guilty of negligence, the traveler can not recover if his own neglect to take such proper precautions proximately contributed to his injury. In order to constitute such proclamation of danger, however, the company should not do, or omit to do, anything which is likely to disarm the traveler and reassure him of his safety. The reason of the law fails if the tracks in fact and beyond all question have been abandoned. A. C. L. R. Co. *v.* Church, 725.

Demurrer to the Evidence.—In an action to recover damages to an automobile caused by a collision with a freight train, drawn by two engines, at and upon a public railroad crossing, where it appeared from the evidence that the jury might have found that the engineer of the front engine, seeing the automobile stalled on the crossing half-mile away, applied the air brakes immediately, as he testified, and this was in ample time to stop the train, but for the neglect of the engineer of the second engine to shut off steam, or the jury might have disbelieved the testimony of the engineer of the front engine, because in conflict with the testimony for the plaintiff and the physical facts shown, it was not error to overrule the defendant's demurrer to the evidence. C. & O. R. Co. *v.* Hunter's Admr., 699.

Eminent Domain.—Section 1294-b, clause 3, of Code of 1904 provides for a change in the location of a county road to avoid the necessity of any crossing, or frequent crossings. Held: That in view of the declaration of policy of the State against grade crossing (Code, Sec. 1294-d, clause 38), that the conversion of a grade crossing into an overhead or bridge crossing came well within the meaning of the section. Forest V. L. Co. *v.* Atlantic, etc., R. Co., 308.

Grade Crossings.—See *infra*, "Eminent Domain."

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CROSSINGS—Continued.

Questions of Law and Fact.—If the rails were so covered with earth as not only to be invisible on the highway bed, but to convey the impression that the track was not in use by trains; if, in addition to this, the rails themselves were rusty, obscured by vegetation growing close to them; and if there was no crossing signal board, as required by Code of 1904, section 1249-d, sub-section 49; then these combined circumstances presented a question to be submitted to the jury to determine whether or not a prudent man exercising due care commensurate with the danger to be apprehended, in approaching such a track, would apprehend danger, or would feel assured of his safety because of the absence of the crossing sign, together with such other surrounding conditions. A. C. L. R. Co. *v.* Church, 725.

Signal Board.—Defendant railroad company was guilty of negligence in failing to construct and maintain the proper signal board at the crossing where plaintiff was injured, as required by sub-section 49 of section 1249-d, Code of 1904. This provision is mandatory and requires crossing signs to be erected and maintained. The object of the statute is to protect human life, and as the injury to the plaintiff was especially such as the maintenance of the sign board was intended to prevent the presumption arises that the injury may have been caused by such neglect, unless the plaintiff's own fault is manifest. Whether this negligence was or was not the cause of the injury must be determined from all the facts and circumstances of the case. A. C. L. R. Co. *v.* Church, 725.

Presumption of abandonment of highway from absence of signal board. A. C. L. R. Co. *v.* Church, 725.

Street Railway Car Colliding with Automobile.—See STREET RAILROADS.

CURE BY VERDICT. See AMENDMENTS.

DAMAGES.

Aggravation of Previous Disease.—In such an action the defendant's rights are fully safeguarded by an instruction that the jury, if they believe from the evidence that the plaintiff had a fibroid tumor before she received the injury complained of, then the plaintiff can recover nothing on account of any condition existing before said injury, or for anything that would have resulted from said condition independently of the accident. Virginia R. & P. Co. *v.* Hubbard, 664.

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DAMAGES—Continued.

Aggravation of Previous Disease—Continued.

Where a wrong is committed, whatever the physical condition of the injured party, whether he be strong or weak, healthy or sickly, the harm done by such wrong, including the aggravation of existing ailments, if any, is the natural consequence of the defendant's act, and need not be specially averred. Virginia R. & P. Co. *v.* Hubbard, 664.

Consequential Damages.—Consequential damage is such damage, loss, or injury as does not flow directly or immediately from the act of the party, but only from some of the consequences or results of such act. Consequential damage must in fact and effect remain the same, whether in the contemplation of either or both parties or not. It is, however, only when such damages are contemplated by both parties that they are recoverable. This mutual contemplation makes them recoverable, but does not change their character from consequential to direct damages. If the consequences are known, or such as ought to be known, to the seller when the contract is made, he will be liable unless he provides against them in the contract. If they are not such as he knows, or ought to know, will follow a breach, he will not be liable. It would, therefore be vain and useless to contract against liability "in any event for consequential damages," unless the term is to be construed to refer to consequences in contemplation when the contract is made. Hence, it must follow from the foregoing postulate that the mere fact that consequential damage might result from delay in deliveries of the articles sold was contemplated by the parties at the date of the contract could not *ipso facto* convert such damage into direct damage; and any argument based upon that false premise cannot be sound. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Consequential damages arise when certain special facts are known to the defendant at the time of the contract which would give notice to him that a breach of the contract would result in an otherwise unexpected loss. If the special circumstances are communicated to the defendant the damages resulting from the breach of such contract might reasonably be presumed to be contemplated by the parties and may be recovered by the plaintiff unless there is an agreement between the parties with reference to the damages. In the case in judgment, the agreement between the parties exempted the defendant from liability for such damages. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

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DECLARATION. See COUNTS; PLEADING.

Allegation of Pre-Existing Disease.—Allegations sufficient to admit proof of the existence of a pre-existing tumor, from which she had suffered little inconvenience; that as a result of the blow an operation was made necessary; the physical pain preceding and succeeding the operation, and of the condition of the plaintiff at the time of the trial. Virginia R. & P. Co. *v.* Hubbard, 664.

Disease.—See *infra*, "Aggravation of Previous Disease."

Excessive or Inadequate Damages.—See NEW TRIALS.

Fires.—See FIRES.

Instructions.—When an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But this general rule will not be carried so far as to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, *"de minimis lex non curat.'* Virginia Railway, etc., Co. *v.* Hill, 397.

Interest.—*When Allowed in Actions on Contracts.*—In Minor's Inst., Vol. 4, part 1 (ed. 1878), p. 739, it is said that "when the action is founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. It is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract." Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Section 3390 of the Code of Virginia is as follows: "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action, whether on contract or tort, the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which interest shall commence." The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such

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DECLARATION. Continued.

Interest—Continued.

as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon the general assumpsit. Under all the circumstances of the case, the statute above quoted applied, and the jury had the right, in their discretion, to fix the date from which the interest should begin to run. Consequently, a peremptory instruction of the lower court to the jury that if they found for the plaintiff they should allow interest from the time the plaintiff's demand accrued, under the terms of the contract, was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Loss of Time.—In an action for personal injuries, the jury were instructed that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries." There was evidence that plaintiff was in the hospital for three weeks, and thereafter for six weeks he was only able to spend a part of each day at his place of business. It did not appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence. The instruction was held not prejudicial error warranting a reversal where the other elements of damage were all properly set out. Virginia Railway, etc., Co. *v.* Hill, 397.

Nuisances.—Recovery of entire damage, both past and future, where there is a permanent nuisance. Magruder *v.* Va.-Car. Chem. Co., 352.

Personal Injuries.—See *infra*, "Aggravation of Previous Disease;" "Loss of Time."

Remittitur.—See REMITTITUR.

Sentimental Value.—The rights of the defendant were safeguarded with respect to the evidence of plaintiff attaching a sentimental value to two portraits destroyed by fire, where the court instructed the jury that in estimating damages, they could not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Waters and Watercourses.—See WATERS AND WATERCOURSES.

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DECLARATIONS AND ADMISSIONS.

Self-Serving Declarations.—Statements made by the plaintiff to a doctor as to her suffering from injuries are admissible, although she had employed him for the purpose of making him a witness in the action which she had determined to institute to recover damages for such suffering and injuries. The circumstance only goes to the weight of the evidence. The diagnosis of plaintiff's condition, made by the doctor under these circumstances, is admissible without an instruction from the court as to the weight to be given thereto by the jury, where no instruction on the subject was asked by defendant. Shenandoah Valley, etc., Co. *v.* Murray, 563.

DEATH.

Presumptions and Burden of Proof.—Death is presumed to be the result of natural dissolution rather than of accidental injury. General Accident, etc., Corp. *v.* Murray, 115.

DECREE. See JUDGMENTS AND DECREES.

DEDICATION.

Bridges.—A city sought to show a dedication to the public of an approach to a bridge owned by a public service corporation. The approach in question was indispensable to the use of the bridge and the company's control of it was essential to the discharge of its duty to the public. Therefore, the company could not expressly have dedicated the approach unqualifiedly to the city, because such dedication would have been in derogation of its charter obligation to the community at large and ultra vires and not binding upon the corporation. If this be so with respect to an express dedication, a fortiori must it be true of a dedication sought to be established by implication merely. Richmond *v.* Mayo Land & Bridge Co., 545.

The approach to a bridge, being an essential and inseparable part of it, can not be dissevered, since that would deprive the public service corporation of the means of performing a non-delegable duty which it owes to the public. Richmond *v.* Mayo Land & Bridge Co., 545.

The lawfulness of a dedication, like the constitutionality of a law, must depend not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication. Therefore, where a city has power under its charter to close its streets, a public service bridge company can not dedicate to the public as a street the approaches to its bridge. Richmond *v.* Mayo Land & Bridge Co., 545.

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DEDICATION—Continued.

Where a city seeks to show the dedication of an approach to a bridge clear proof of such dedication is required. Richmond *v.* Mayo Land & Bridge Co., 545.

Corporations.—Property necessary to the performance of its duties by a public service corporation can not be dedicated. Richmond *v.* Mayo Land & Bridge Co., 545.

Evidence.—See infra, "Bridges."

Where a city seeks to show the dedication of an approach to a bridge clear proof of such dedication is required. Richmond *v.* Mayo Land & Bridge Co., 545.

Illegal Contracts.—The lawfulness of a dedication, like the constitutionality of a law, must depend not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication. Therefore, where a city has power under its charter to close its streets, a public service bridge company can not dedicate to the public as a street the approaches to its bridge. Richmond *v.* Mayo Land & Bridge Co., 545.

Streets and Highways.—A survey and map of an unincorporated town was duly recorded and expressly referred to in the act of incorporation of the town thus answering the statutory requirements of Virginia Code 1904, section 1014. An action was brought by plaintiff for personal injuries caused by a defective board walk. The contention on behalf of the town was that the point at which the accident happened was originally an approach built by a railroad to a pleasure pavilion, and not a public street. The contention of the plaintiff was that the board walk was an extension of one of the original streets of the town, and that it had long been constantly used by the public and accepted and maintained by the town as a street. It appeared that the town did some repairing to the sidewalk in question. The case was fairly submitted upon this simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff, and their verdict was approved by the trial court. Held: That the verdict should not be disturbed. Virginia Beach *v.* Ogle, 611.

Validity.—See *infra*, "Illegal Contracts."

DEEDS. See VENDOR AND PURCHASER.

Construction.—Construction by parties. Holland *v.* Vaughan, 324.

"On." Forest V. L. Co. *v.* Atlantic, etc., R. Co., 308.

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DEEDS—Continued.

Construction—Continued.

Under familiar and settled rules of construction, the court should look to the purpose of the conveyance as disclosed not only by its terms, but by the surrounding circumstances and the situation of the parties, and should resolve any doubt against the grantor. Forest V. L. Co. *v.* Atlantic, etc., R. Co., 308.

Deeds of Trust.—See MORTGAGES AND DEEDS OF TRUST.

Estoppel.—See MORTGAGES AND DEEDS OF TRUST.

Where a deed duly recorded operates a valid creation and establishment of an alley-way through an entire block, a subsequent purchaser takes subject to it. The deed was in his chain of title, and under familiar rules of law was binding upon him. Daniel *v.* Doughty, 853.

Insanity.—Burden of proof to show lucid interval of grantor. Inge *v.* Inge, 329.

Lost Deeds.—See LOST INSTRUMENTS AND RECORDS.

Mistake.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Reformation.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Trust Deed.—See MORTGAGES AND DEEDS OF TRUST.

DEEDS OF TRUST. See MORTGAGES AND DEEDS OF TRUST.

DEFINITIONS. See WORDS AND PHRASES.

DEMURRER.

Account.—An account filed with a declaration is no part of the declaration, and defects in the account cannot be taken advantage of by demurrer. Norfolk *v.* Norfolk County, 356.

Assumpsit.—A demurrer will not lie to a common-law count in assumpsit. Norfolk *v.* Norfolk County, 356.

Equity.—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled. Hammond *v.* Ryman, 131.

Private Way.—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled. Hammond *v.* Ryman, 131.

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DEMURRER—Continued.

Special Demurrer.—By section 3272 of the Code, special demurrers are abolished in Virginia, and there is no error in overruling a demurrer to a declaration, where the assignment of grounds of demurrer pointed out no defect not cured by this section, which provides that on demurrer no defects in the pleadings shall be regarded unless something be omitted essential to the action or defense. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

DEMURRER TO THE EVIDENCE.

Collision at Crossing.—In an action to recover damages to an automobile caused by a collision with a freight train, drawn by two engines, at and upon a public railroad crossing, where it appeared from the evidence that the jury might have found that the engineer of the front engine, seeing the automobile stalled on the crossing half-mile away, applied the air brakes immediately, as he testified, and this was in ample time to stop the train, but for the neglect of the engineer of the second engine to shut off steam, or the jury might have disbelieved the testimony of the engineer of the front engine because in conflict with the testimony for the plaintiff and the physical facts shown, it was not error to overrule the defendant's demurrer to the evidence. C. & O. R. Co. *v.* Hunter's Admr., 699.

When Demurrer Overruled.—Where it appeared from the evidence that there were two aspects of the case in which the jury might have found for the plaintiff, it is not error for the court below to sustain the verdict of a jury and overrule defendant's demurrer to the evidence. C. & O. R. Co. *v.* Hunter's Admr., 699.

DEPOSIT. See BANKS AND BANKING.

DESCENT AND DISTRIBUTION.

Advancements.—See ADVANCEMENTS.

Infants' Estates.—Section 2556, of the Code of 1904, provides that if an infant die without issue, having title to real estate derived from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent, if any be living at the death of the infant, and if there be no such kindred living, then it shall descend and pass to his kindred on the side of the other parent. Under this statute, on failure of issue of an infant last seized, the inheritance descends to the infant's kindred on the side of that parent from whom the real estate was derived, when, as in the case at bar, there are such kindred living at the death of the infant. That is to say, in the quest for the ancestor of the infant who shall constitute the root, or stem, or propositus, from whom the inheritance shall descend, we

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DESCENT AND DISTRIBUTION—Continued.

Infants' Estates—Continued.

can ascend only to the parent of the infant from whom the real estate was derived, whether such parent may chance to be the first purchaser of the estate or not. The statute does not permit the ascension beyond the parent to the grandparent, or to any other ancestor of the infant, in order to reach the first purchaser as the propositus from whom the inheritance shall descend. Bonewell *v.* Smith, 431.

Kindred.—The word "kindred" as used in section 2556, of the Code of 1904, has the meaning of next of kin. Bonewell *v.* Smith, 431.

Order of Descent.—Order of descent and persons entitled to inherit under the statute. Corbitt *v.* Wright, 471.

Statutory provision stated and construed. Corbitt *v.* Wright, 471.

Theory of the statute. Corbitt *v.* Wright, 471.

DESERTION. See DIVORCE.

DIRECTORS. See OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

DISEASE.

Aggravation of previous disease. Virginia R. & P. Co. *v.* Hubbard, 664.

DIVIDENDS. See STOCK AND STOCKHOLDERS.

DIVORCE.

Desertion.—Evidence in a suit for divorce for desertion should show all the circumstances immediately preceding the separation and the events immediately succeeding the separation. The policy of the law is against divorce by consent, and full and satisfactory evidence should be required, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse. Walker *v.* Walker, 410.

Testimony that a wife left of her own accord; that her husband gave her no cause to leave him; "that she just got tired, and decided to leave, and left," will not warrant a divorce a vinculo matrimonii. Walker *v.* Walker, 410.

The desertion, to justify a decree for an absolute divorce, must be a willful desertion, and the court to which the evidence is submitted can only determine whether or not such desertion is willful by having all the facts and attendant circumstances fully and frankly presented. Walker *v.* Walker, 410.

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DIVORCE—Continued.

Evidence.—Evidence in a suit for divorce for desertion should show all the circumstances immediately preceding the separation and the events immediately succeeding the separation. The policy of the law is against divorce by consent, and full and satisfactory evidence should be required, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse. Walker *v.* Walker, 410.

Marriage Annulment.—Neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children. Francis *v.* Tazewell, 319.

Under the provisions of the act of February 27, 1866, Code of 1904, section 2227, where a man and woman, both slaves, agreed to occupy the relation to each other of husband and wife in pursuance of that agreement cohabited together prior to February 27, 1866, the subsequent abandonment after the passage of the act, of the woman by the man for unfaithfulness, could neither dissolve the marriage nor affect the legitimacy of the children of the marriage. Francis *v.* Tazewell, 319.

DOCUMENTARY EVIDENCE.

Minutes of Corporate Meeting.—The minutes of the meetings of the board of directors of a Farmers Exchange, and copies of correspondence obtained from its files, relating directly or indirectly to the note in question, were admissible in an action against the endorsers, all of whom were either stockholders or directors of the Exchange. Colona *v.* Parksley Nat. Bank, 812.

DRAINS AND SEWERS.

Appeal and Error.—In a proceeding under the provisions of section 2576, Code of 1904, to determine the right of drainage through the lands of another, where none of the evidence is certified on writ of error by defendant, it will be presumed that a proper case was made out. Hodges *v.* Richmond Cedar Works, 492.

The statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts not being certified, it is very doubtful whether the constitutional question can be consid-

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DRAINS AND SEWERS—Continued.

Appeal and Error—Continued.

ered at all when raised for the first time on appeal. Hodges *v.* Richmond Cedar Works, 492.

Constitutional Law.—The primary question of the public use and necessity of drainage rights in general has been determined by the legislature, and this will be controlling with the courts, in the absence of something to show a palpable want of foundation for the legislative pronouncement. Hodges *v.* Richmond Cedar Works, 492.

The Virginia drainage laws, embodied in sections 2576-257. Code of 1904, are constitutional. Hodges *v.* Richmond Cedar Works, 492.

Private Drains and Sewers.—In a proceeding under section 2576 of the Code of 1904, to establish a right of drainage over the lands of another, the commissioners reported and the court approved a different location for the drain from that asked for in the original petition of the applicant. There is nothing in the statute to indicate a purpose to confine an applicant to the mode of drainage originally contemplated or proposed by him, if he is willing to accept another which the commissioners and the court deem proper. The new or modified mode then becomes the "mode proposed by the applicant" within the meaning of the law. Hodges *v.* Richmond Cedar Works, 492.

The primary question of the public use and necessity of drainage rights in general has been determined by the legislature, and this will be controlling with the courts, in the absence of something to show a palpable want of foundation for the legislative pronouncement. Hodges *v.* Richmond Cedar Works, 492.

The Virginia drainage laws, embodied in sections 2576-2579, Code of 1904, are constitutional. Hodges *v.* Richmond Cedar Works, 492.

Validity of proceedings to establish drains over another's land. Hodges *v.* Richmond Cedar Works, 492.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW.

DURESS.

Compromise.—A contract of compromise, entered into with full knowledge of all the facts, cannot be set aside on the ground of duress when the other party has not been guilty of any unlawful act. The fact that one of the parties entered into

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DURESS—Continued.

Compromise—Continued.

such a contract reluctantly, or was badly in need of money at the time, is not sufficient to constitute duress. Cary *v.* Harris, 252.

Where rescission is sought on the ground of fraud or duress such fraud or duress must be clearly shown. Cary *v.* Harris, 252.

Partnership.—Where a partner who had retired from the partnership at the solicitation of his late partners signed a contract of assignment of a government contract which had been obtained by the partnership, being under no obligation to sign the contract of assignment, and preferring not to do so at all, even for a consideration, there was no foundation upon which to rest any claim of duress in the procurement of the new agreement by which he was to receive a share of the profits. Clay's Adm'r *v.* Kelly, 437.

EASEMENT.

Abandonment.—The law is perfectly well settled that the burden of proof to show an abandonment of an easement is upon the party claiming such abandonment, and that he must establish the fact by clear and unequivocal evidence. Daniel *v.* Doughty, 853.

Drains.—See DRAINS AND SEWERS.

Easements Appurtenant.—See PRIVATE WAYS.

Necessity, Way of.—See PRIVATE WAYS.

Private Ways.—See PRIVATE WAYS.

Ways.—See PRIVATE WAYS.

EJECTMENT.

Boundaries.—Right of party to proceed under the act of March 4, 1912, instead of bringing ejectment. Christian *v.* Bulbeck, 74.

EJUSDEM GENERIS. See INTERPRETATION AND CONSTRUCTION.

ELECTION OF REMEDIES.

Warranty.—Where an action is based upon a breach of warranty, the purchaser may, if he chooses, waive the tort and sue upon the contract, or waive the contract and sue in tort. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

EMINENT DOMAIN.

Bridges.—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old

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EMINENT DOMAIN—Continued.

Bridges—Continued.

bridge with its approaches as a location for the new bridge. Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it. Richmond *v.* Mayo Land & Bridge Co., 545.

Crossings.—See CROSSINGS.

Drains and Sewers.—See DRAINS AND SEWERS.

Presumptions and Burden of Proof.—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old bridge with its approaches as a location for the new bridge. Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it. Richmond *v.* Mayo Land & Bridge Co., 545.

Release.—A vendor to a railroad company released any claim to damages to the remainder of the tract of land by the construction of a railroad or railroad works on the land conveyed such as could be recovered in condemnation proceedings. Held: That the release covered damages caused by the change of a grade crossing to an overhead crossing. Forest V. L. Co. *v.* Atlantic, etc., R. Co., 308.

EMPLOYER AND EMPLOYEE. See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACT. See MASTER AND SERVANT.

ENDORSEMENT. See BILLS, NOTES AND CHECKS.

EQUITABLE LIENS. See LIENS.

EQUITABLE MORTGAGES. See MORTGAGES AND DEEDS OF TRUST.

EQUITY.

Assumpsit.—See ASSUMPSIT.

Bill.—*Requisites and Sufficiency.*—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled. Hammond *v.* Ryman, 131.

Commissioner in Chancery.—See MASTER IN CHANCERY.

Decree. See JUDGMENTS AND DECREES.

Demurrer.—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also b[illegible]

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EQUITY—Continued.

Demurrer—Continued.

virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled. Hammond *v.* Ryman, 131.

Jurisdiction.—See JURISDICTION.

Laches.—See LACHES.

Master in Chancery.—See MASTER IN CHANCERY.

Partnership.—Complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleged profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction. Clay's Adm'r *v.* Kelly, 437.

Reformation of Instruments.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Rescission.—See RESCISSION, CANCELLATION AND REFORMATION.

Subrogation.—See SUBROGATION.

Suretyship.—See SURETYSHIP.

ESTOPPEL.

Deeds.—Where a deed duly recorded operates a valid creation and establishment of an alley-way through an entire block, a subsequent purchaser takes subject to it. The deed was in his chain of title, and under familiar rules of law was binding upon him. Daniel *v.* Doughty, 853.

Director of Corporation.—Under a pooling agreement made at the time of a sale of part of the interest of appellant to appellees, it was agreed that the president's salary should be arranged at a stockholder's meeting. Held: That notwithstanding this agreement, appellees could not object to the salary fixed at a director's meeting, where one of them who also represented the other took part in the action. Cary *v.* Holt's Ex'ors, 261.

Mortgages and Deeds of Trust.—J. and L., father and son, gave a deed of trust, which provided that the trustee should "sell

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ESTOPPEL—Continued.

Mortgages and Deeds of Trust—Continued.

first the lands conveyed by J. and, if a sufficient amount is derived to pay the debt and costs, will not make further sale." Subsequently, L. conveyed his land in trust to secure other creditors, some of whose debts were contracted after the recordation of the first deed and upon the faith of the above quoted statement therein contained, but who made no inquiry of J. as to the relation of himself and L. concerning the joint debt above mentioned. Held: That J. was not estopped from showing by other clauses of the deed and extrinsic evidence that he was primarily bound for only one-half of the debt. Baugh & Sons Co. *v.* Black, 12.

Reformation of Instruments.—Although defendant had given a deed of trust on the tract of land in question after complainant had declined an offer of reconveyance, it was held that complainant was not estopped, where it appeared that defendant was secured collaterally, and was besides able to pay off the debt. Inge *v.* Inge, 329.

EVIDENCE.

Accident.—Sufficiency of proof to show accident. General Accident, etc., Corp. *v.* Murray, 115.

Accident Insurance.—Sufficiency of evidence to show accident. General Accident, etc., Corp. *v.* Murray, 115.

Admissions.—See DECLARATIONS AND ADMISSIONS.

Aggravation of Previous Disease.—Admissibility of evidence in personal injury cases tending to show the aggravation of existing ailments. Virginia R. & P. Co. *v.* Hubbard, 664.

Appeal and Error.—Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out.—Conrad *v.* Ellison-Harvey Co., 458.

Burden of Proof.—See PRESUMPTIONS AND BURDEN OF PROOF.

Burglary.—See BURGLARY.

Conflicting Evidence.—See NEW TRIALS.

Declarations and Admissions.—See DECLARATIONS AND ADMISSIONS.

Dedication.—See DEDICATION.

Demurrer to the Evidence.—See DEMURRER TO THE EVIDENCE.

Disease.—See *infra*, "Aggravation of Previous Disease."

Divorce.—Evidence in a suit for divorce for desertion should show all the circumstances immediately preceding the separation

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EVIDENCE—Continued.

Divorce—Continued

and the events immediately succeeding the separation. The policy of the law is against divorce by consent, and full and satisfactory evidence should be required, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse. Walker *v.* Walker, 410.

Documentary Evidence.—See DOCUMENTARY EVIDENCE.

Expert and Opinion Evidence.—See EXPERT AND OPINION EVIDENCE.

Extrinsic Evidence.—See PAROL EVIDENCE.

Fraud.—See FRAUD AND DECEIT.

Instructions.—Instructions should be read with reference to the evidence in the case in which they are given. Christian *v.* Bulbeck, 74.

Lost Instruments and Records.—Sufficiency of evidence to establish lost deed. Dunnavant *v.* Dunnavant, 301.

Master and Servant.—The plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in determining the probable intention of the parties in continuing the relationship after the first year had expired. After the end of each year, the employment continued, some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. Conrad *v.* Ellison-Harvey Co., 458.

Non-Production of Evidence.—See PRESUMPTIONS AND BURDEN OF PROOF.

Opinion Evidence. See EXPERT AND OPINION EVIDENCE.

Parol Evidence.—See PAROL EVIDENCE.

Partnership.—Shortly after the final assignment of the government contract, and in pursuance of the contract with the assignees, a receiver was procured for the partnership, and thereby certain technical difficulties were obviated, and the transfer of the government contract was perfected. Held: That although the complainant was not a party to that suit, the record might be introduced by him to show the facts appearing therein as to the transfer of the contract, the dis-

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EVIDENCE—Continued.

Partnership—Continued.

position of the assets of the firm, and the payment therefo . The matters shown in that record were not within the rule of evidence as to res inter alios acta. They were independent material facts, proved by the record, charged in the com plainant's bill, and proper as evidence to support his case. Clay's Adm'r *v.* Kelly, 437.

Presumptions.—See PRESUMPTIONS AND BURDEN OF PROOF.

Prior or Subsequent Existence.—In an action for damages occasioned by the sagging of a telephone wire, testimony as to the condition of the wire about two months after the accident was admissible within the discretion of the court, in the absence of evidence of any change in the condition, where the lapse of time did not necessarily involve a change in the condition. Shenandoah Valley, etc., Co. *v.* Murray, 563.

The general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, but no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential. The admissibility of such evidence must be left largely to the discretion of the trial court. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Questions of Law and Fact.—See QUESTIONS OF LAW AND FACT.

Reformation of Instruments.—See REFORMATION OF INSTRUMENTS.

Reopening Case.—In an action for personal injuries occasioned by a collision between a street car and an automobile, defendant street railway company, after the evidence had been concluded and plaintiff had rested and concluded her case, demurred to the evidence, because no proof had been offered as to the ownership of the street car which collided with the automobile. The trial court allowed plaintiff to reopen the evidence and prove the ownership of the street car. In this there was no error. Virginia R. & P. Co. *v.* Gorsuch, 655.

Streets and Highways.—See STREETS AND HIGHWAYS.

Testimony Peculiarly Within Knowledge of Party to Suit.—See PRESUMPTIONS AND BURDEN OF PROOF.

Verdict Contrary to the Evidence.—See NEW TRIAL.

EXCEPTIONS AND OBJECTIONS. See APPEAL AND ERROR.

EXCEPTIONS, BILL OF.

Certification of Facts or Evidence.—*Drains and Sewers.*—In a proceeding under the provisions of section 2576, Code of 1904, to determine the right of drainage through the lands of an-

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EXCEPTIONS, BILL OF—Continued.

Certification of Facts or Evidence—Continued.

other, where none of the evidence is certified on writ of error by defendant, it will be presumed that a proper case was made out. Hodges *v.* Richmond Cedar Works, 492.

The statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal. Hodges *v.* Richmond Cedar Works, 492.

EXECUTORS AND ADMINISTRATORS. See TRUSTS AND TRUSTEES.

Advice of Court.—See *infra*, "Resort to Court for Direction and Advice."

Care to be Exercised by Executor.—Nothing more is in general required of an executor or trustee than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. Shepherd *v.* Darling, 586.

Compensation.—Testator gave his executor certain bank stock in trust, and also gave him the sum of $500 as compensation for his services. The executor was the testator's intimate personal friend and legal adviser who drew the will. Notwithstanding this specific bequest of $500 as compensation for his services, the executor collected 5 per cent. commission on the first $300 and 2 per cent. commission on the remainder of the book valuation of the bank stock. He also collected 5 per cent. on most but not all of the dividends paid to him under the trust. Held: That this interpretation of the will by the executor was entitled to no small consideration; and, that what would appear to be the correct interpretation of the will had been put into practical effect by the man whom the testator trusted with its preparation and execution. No further allowance based upon the increased value of the stock at the end of the trust should be allowed. Williams *v.* Bond, 678.

When a testator fixes the compensation for an executor or trustee under his will, and the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little as the testator has fixed. In cases where the language of the testator is susceptible of more than one construction, the question becomes one of interpretation which the courts must settle by ascertaining the probable intention and understanding of the parties. Where no

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EXECUTORS AND ADMINISTRATORS—Continued.

Compensation—Continued.

compensation at all is named in the will, the rule is that the allowance shall be reasonable, being usually 5 per cent. on receipts, subject to increase or reduction of this rate under peculiar circumstances. Williams *v.* Bond, 678.

Costs.—It is unusual for the Court of Appeals to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars, unless in case of palpable error. Williams *v.* Bond, 678.

Where upon the death of an executor and trustee his executor being charged under Code 1904, section 3419, with executing the trust, in good faith, brings suit to determine the rights of the beneficiaries and his own testator, he is entitled to his costs in the lower court and a reasonable allowance as an attorney's fee. Such a case presents an exception to the practice noted in the preceding syllabus. But as in the case at bar the executor was not the party substantially prevailing upon appeal, he was not entitled to costs in the appellate court. Williams *v.* Bond, 678.

Dealing with the Estate for Individual Benefit.—Where a beneficiary dealing with the trustee has sought and obtained independent advice from a person competent to advise as to the particular transaction, this fact will go far to give assurance of its fairness and to induce a court of equity to uphold it. Shepherd *v.* Darling, 586.

Persons who may be Appointed Administrators.—Persons other than distributees. Tompkins *v.* Poff, 162.

Removal. Tompkins *v.* Poff, 162.

Sections 2637, 2639, 2640 of Code. Tompkins *v.* Poff, 162.

Sons of a testator, although devisees and legatees under his will, would have been his distributees had the testator died intestate, and therefore, may waive their right in favor of any other person. Tompkins *v.* Poff, 162.

Waiver of right to appointment. Tompkins *v.* Poff, 162.

Removal or Revocation of Letters.—Appointee in whose favor a distributee waives his right to qualify can only be removed for cause. Tompkins *v.* Poff, 162.

Distributee who applies for administration and is appointed can only be removed for cause. Tompkins *v.* Poff, 162.

Section 2639 of the Code recognizes two classes of persons as eligible to appointment as administrators: (1) distributees or their designees, and (2) creditors or any other person after the expiration of thirty days from the death of the

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EXECUTORS AND ADMINISTRATORS—Continued.

Removal or Revocation of Letters—Continued.

intestate. The provision of section 2640 which allows a distributee, upon mere notice, to displace "a creditor or other person than a distributee" applies only to persons of the second class above mentioned, and not to a distributee or his designee. Tompkins v. Poff, 162.

Resort to Court for Direction and Advice.—Where property is held under a trust by his testator at the time of his death, which vested in him no discretion as to the time or manner of its disposition, as executor is charged with the duty of "executing the trust or so much thereof as remained unexecuted," under the provisions of section 3419 of the Code, and where a difference of opinion arises between him and the beneficiaries of the trust as to what were the rights of his testator in the matter of compensation, he may seek the aid and advice of a court of equity as to the respective rights of the parties. The subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the executor followed a recognized and approved practice in seeking the aid and advice of a court of equity. Williams *v.* Bond, 678.

Where upon the death of an executor and trustee his executor being charged under Code 1904 section 3419, with executing the trust, in good faith, brings suit to determine the rights of the beneficiaries and his own testator, he is entitled to his costs in the lower court and a reasonable allowance as an attorney's fee. Such a case presents an exception to the practice noted in the preceding syllabus. But as in the case at bar the executor was not the party substantially prevailing upon appeal, he was not entitled to costs in the appellate court. Williams *v.* Bond, 678.

Although under the terms of the will, a surviving executor had the power to sell the property of his testator without an order of court, yet he had the right, notwithstanding such power, to go into a court of equity for advice and instruction upon the proposition, and having taken that course in good faith, he is fully protected by the order of court under which he acted. Shepherd *v.* Darling, 586.

Sale of Realty.—See *infra*, "Resort to Court for Direction and Advice."

EXPERT AND OPINION EVIDENCE.

Appeal and Error.—Where there was no objection to the testimony of a witness on the ground of his incompetency to tes-

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EXPERT AND OPINION EVIDENCE—Continued.

Appeal and Error—Continued.

tify as an expert, the credibility and weight to be given his testimony are solely for the jury. C. & O. R. Co. *v.* Hunter's Adm'r, 699.

Non-Expert Opinion.—A statement of a non-expert witness that the plaintiff "seemed to be suffering and nervous,'" was admissible. Not all conclusions of fact of a non-expert witness are inadmissible in evidence. If it is clear that the jurors were, or could have been, as fully and as exactly furnished with the data which formed the basis for the conclusion of the witness as the latter was, the conclusion is inadmissible in evidence; if not, it is admissible. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Weight for Jury.—Where there was no objection to the testimony of a witness on the ground of his incompetency to testify as an expert, the credibility and weight to be given his testimony are solely for the jury. C. & O. R. Co. *v.* Hunter's Adm'r, 699.

EX POST FACTO LAWS.

Ex post facto laws relate to criminal procedings which inflict punishments or forfeitures and not to civil proceedings which affect private rights retrospectively. Com. *v.* United Cigarette M. Co., 835.

EXTRINSIC EVIDENCE. See PAROL EVIDENCE.

FALSE PRETENSES.

Larceny by False Pretenses.—An indictment alleged the larceny of money by false pretenses, whereas the proof showed the larceny of a check afterwards cashed by defendant. Held: That in every real sense money was paid to the accused, and, therefore, the charge in the indictment was substantiall, proven. Lewis' Case, 875.

FEDERAL EMPLOYERS' LIABILITY ACT. See MASTER AND SERVANT.

FELLOW SERVANTS.

Who Are Vice-Principals.—A servant who is charged with the duty of supplying and maintaining suitable instrumentalities with which other servants are to work, and of performing the non-assignable duties of the master, is a vice-principal, and the master is liable for damages proximately resulting from his negligent performance of the duties devolved upon him. Millboro Lumber Co. *v.* Donald, 150.

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FILLING BLANKS. See BILLS, NOTES AND CHECKS.

FIRE INSURANCE.

Deposit of Securities by Foreign Insurance Company.—A contract of reinsurance is not a policy within the Virginia insurance act. Shepherd *v.* Va. State Ins. Co., 383.

A deposit required by section 17 (chapter 2) of the Virginia insurance act (laws 1906, c. 112) is for the protection of property owners in their fire insurance contracts, and not to protect other insurance companies on their contracts of reinsurance. Shepherd *v.* Va. State Ins. Co., 383.

Policy.—Contracts of reinsurance are not policies. Shepherd *v.* Va. State Ins. Co., 383.

Whether contracts of reinsurance are policies. Shepherd *v.* Va. State Ins. Co., 383.

Reinsurance.—A domestic insurance company, holding a contract of reinsurance on risks outside of this State with a foreign company doing business in this State, is not entitled, in case of the latter's insolvency, to be classed as a policy holder and lienor under the provisions of section 17 (chapter 2) of the Virginia insurance act (laws 1906, c. 112). Shepherd *v.* Va. State Ins. Co., 383.

FIRES.

Constitutional Law.—The act of the General Assembly (Acts 1908, p. 388), declaring the liability of railroads for damages from fires occasioned by sparks or coals dropped or thrown from an engine or train, is constitutional. C. & O. R. Co. *v.* May, 790.

Damages.—*Conflicting Instructions.*—The court instructed the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiff's bill of particulars, which had a peculiar value to plaintiffs, they must determine from all of the evidence what was the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof. Held: That this instruction was not in conflict with the previous instruction that the jury should not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Evidence of Adaptability of Property Destroyed for a Particular Use.—In an action for the destruction of property by fire, evidence is admissible as to the location of the property

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FIRES—Continued.

Damages—Continued.

destroyed with reference to its adaptability for school and other purposes. The measure of damages is the market value of the property at the place where it is located; and, if the uses to which it had been devoted and for which it was available, together with its location, tended to increase its market value, there is no rule of law or reason why these elements of value should be excluded from the consideration of the jury. C. & O. R. Co. *v.* May, 790.

Evidence of Sentimental Value.—The rights of the defendant were safe-guarded with respect to the evidence of plaintiff attaching a sentimental value to two portraits destroyed by fire, where the court instructed the jury that in estimating damages, they could not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Measure of Damages—Cost of Replacing Houses.—Defendant railroad, in an action for the destruction of building by fire, requested the court to instruct the jury that the measure of damages for houses destroyed by fire was "the value of such houses at the time and place of destruction, and that the cost of replacing the houses is not the proper measure of damages in such case and should not be considered by the jury in estimating damages." The court substituted for the language after the word "destruction," "and the cost of replacing the houses is not by itself the proper measure of damages in such case but should be considered by the jury in estimating damages." Held: That this modification did not constitute prejudicial error, if error at all. C. & O. R. Co. *v.* May, 790.

Measure of Damages—Personal Property.—In such an action defendant requested the court to instruct the jury that the measure of damages for personal property destroyed was the market value of such property. The court modified the instruction by substituting the words "proven value" for "market value." Held: No error, it not appearing that there was any market value for the property, and the evidence of the plaintiffs establishing the proven value being practically unchallenged by the evidence on behalf of the defendant. C. & O. R. Co. *v.* May, 790.

Separate Damages.—In an action for property destroyed by fire, the jury may consider separately damages for the destruction of the buildings from damages to the freehold. C. & O. R. Co. *v.* May, 790.

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FIRES—Continued.

Evidence.—See *infra*, "Damages."

Where the circumstances justify the jury in finding that the fire was set out by the defendant's engine, greater particularity of proof is not required. C. & O. R. Co. *v.* May, 790.

Hearsay Evidence.—In an action for the destruction of property by fire, exception was taken to the introduction of certain plans of the dwelling house by the plaintiff, because made by an expert, from information derived from plaintiff. The plans were not relied on as possessing any probative value, but were merely employed by way of illustration by the opinion witnesses; and besides, the opinions of the experts were shown to have been predicated upon the truth of plaintiff's testimony. Held: That there was no force in the exception. C. & O. R. Co., *v.* May, 790.

Instructions.—*Conflicting Instructions.*—The court instructed the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiffs' bill of particulars, which had a peculiar value to plaintiffs, they must determine from all of the evidence what was the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof. Held: That this instruction was not in conflict with the previous instruction that the jury should not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Witnesses.—Plaintiff, in testifying to the value of the personal property, used an inventory of the articles destroyed. This inventory was prepared in part from information derived from other persons. As the inventory was not introduced or relied on as evidence, but was used as a memorandum by the witness while testifying before the jury, an exception to its use was without merit. C. & O. R. Co. *v.* May, 790.

FLOODING LANDS. See WATERS AND WATERCOURSES.

FLOODS. See WATERS AND WATERCOURSES.

F. O. B.

Lawson *v.* Hobbs, 690.

FOREIGN CORPORATIONS.

Insolvency.—See INSURANCE.

Insurance Companies.—See INSURANCE.

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FORMA PAUPERIS.

Appeal and Error.—Section 3538, Code of 1904, provides that, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party." Held: That this section does not apply to appellate proceedings. Tyler *v.* Garrison, 697.

FRANCHISE.

Impairment of Obligation of Contract.—See CONSTITUTIONAL LAW.

FRAUD AND DECEIT.

Assumpsit.—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. Norfolk *v.* Norfolk County, 356.

Compromise.—If a party makes a deliberate settlement of an alleged fraud, with his eyes wide open, such settlement will not be disturbed. Parties may settle frauds as well as anything else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a court. Cary *v.* Harris, 252.

When rescission is sought on the ground of fraud or duress such fraud or duress must be clearly shown. Cary *v.* Harris, 252.

Evidence.—It is elementary that a party alleging fraud is required to prove the same by clear and convincing testimony. Cary *v.* Harris, 252.

FRAUDS, STATUTE OF.

Master and Servant.—A servant was employed under a written contract for one year, beginning on January 1st, and afterwards continued in his employment from year to year without any other contract in writing, until his discharge on June 30, 1914. Held: That his contract for 1914 was based upon implication and presumption drawn in part from previous dealings between the parties, but it was nevertheless a new contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for one year's service, to begin and be performed within the year, and consequently not within the statute of frauds. Conrad *v.* Ellison-Harvey Co., 458.

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FRAUDULENT AND VOLUNTARY CONVEYANCES.

Presumptions and Burden of Proof.—The circumstance that counsel for one of the deed of trust creditors was also counsel for the debtor is no evidence of fraudulent collusion between the debtor and the deed of trust creditors, especially in the absence of any charge of fraud in the pleadings. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

GENERAL ISSUE. See PLEADING.

GRADE CROSSINGS. See CROSSINGS.

GUARANTY. See WARRANTY.

Streets and Highways.—A contractor guaranteed to keep the work done under his contract for pavement of a street in good repair for a period of ten years. Held: That the contractor could not be excused by reason of the settlement of the foundation of the street car tracks on the street causing injury to the work guaranteed, where it appeared that the parties had the subject of the street car tracks upon the streets in mind. Davis *v.* Newport News, 290.

GUARDIAN AD LITEM. See INFANTS; INSANITY.

HARMLESS ERROR. See APPEAL AND ERROR.

HEARSAY EVIDENCE.

Fires.—In an action for the destruction of property by fire, exception was taken to the introduction of certain plans of the dwelling house by the plaintiff, because made by an expert, from information derived from plaintiff. The plans were not relied on as possessing any probative value, but were merely employed by way of illustration by the opinion witnesses; and besides, the opinions of the experts were shown to have been predicated upon the truth of plaintiff's testimony. Held: That there was no force in the exception. C. & O. R. Co. *v.* May, 790.

HIGHWAYS. See STREETS AND HIGHWAYS.

HOLDING OVER. See LANDLORD AND TENANT.

HUSBAND AND WIFE.

Contributory Negligence.—The wife owned an automobile. Her husband at work in another city from his home borrowed it from her. The husband had had possession of the automobile for about a week when his wife visited him, and while riding in the automobile driven by her husband was injured in a

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HUSBAND AND WIFE—Continued.

Contributory Negligence—Continued.

collision with a street car. The wife was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the a - proaching street car, talking from time to time with a guest. Held: That the negligence, if any, of her husband, could not be imputed to her, and that she was herself guilty of no negligence. Virginia R. & P. Co. *v.* Gorsuch, 655.

Imputable Negligence.—The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. Virginia R. & P. Co. *v.* Gorsuch, 655.

Obligation of Wife.—Notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband. Virginia R. & P. Co. *v.* Gorsuch, 655.

ILLEGAL CONTRACTS.

Dedication.—See DEDICATION.

Usury.—See USURY.

ILLEGITIMACY. See BASTARDY.

IMPAIRMENT OF OBLIGATION OF CONTRACTS. See CONSTITUTIONAL LAW.

IMPLIED CONTRACTS.

Assumpsit.—See ASSUMPSIT.

IMPLIED WARRANTY. See WARRANTY.

IMPUTABLE NEGLIGENCE.

Automobiles.—The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. Virginia R. & P. Co. *v.* Gorsuch, 655.

The negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. Virginia R. & P. Co. *v.* Gorsuch, 655.

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IMPUTABLE NEGLIGENCE—Continued.

Bailments.—The negligence of a bailee of property, over whom the bailor is exercising no control at the time of injury, is no imputable to the bailor. Virginia R. & P. Co. *v.* Gorsuch, 655.

Husband and Wife.—The negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. Virginia R. & P. Co. *v.* Gorsuch, 655.

Master and Servant.—The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. Virginia R. & P. Co. *v.* Gorsuch, 655.

Private Vehicle.—Where a passenger is in a private vehicle by invitation and is exercising no control over the driver, the negligence of such driver cannot be imputed to the passenger. If precluded from recovery it must be because of his own negligence. Virginia R. & P. Co. *v.* Gorsuch, 655.

INDORSEMENT. See BILLS, NOTES AND CHECKS.

INFANTS.

Descent and Distribution.—See DESCENT AND DISTRIBUTION.

Guardian Ad Litem.—Necessity of appointment in proceedings to sell infant's lands. Brenham *v.* Smith, 30.

Sale of Infants' Lands.—Answer of guardian ad litem necessary. Brenham *v.* Smith, 30.

Answer of infant over fourteen necessary. Brenham *v.* Smith, 30.

Decree void on account of vital defects in proceedings. Brenham *v.* Smith, 30.

Section 3425, Code of 1904, does not protect a sale under a totally void decree. Brenham *v.* Smith, 30.

Substantial compliance with the statute is essential to the validity of the proceedings. Brenham *v.* Smith, 30.

Verification of the bill necessary. Brenham *v.* Smith, 30.

IN FORMA PAUPERIS. See FORMA PAUPERIS.

INSANITY.

Deeds.—Burden of proof to show lucid interval of grantor. Inge *v.* Inge, 329.

Guardian Ad Litem.—Section 2618 and 2619, Code of 1904, are inapplicable to partition suits. Cottrell *v.* Mathews, 847.

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INSANITY—Continued.

Guardian Ad Litem—Continued.

Where the amended bill in a partition suit suggested that one of the parties was non compos mentis, and prayed for the appointment of a guardian at litem, but the party and her husband and the appellant were all strenuously denying her insanity, and the issue was undetermined when she died, the fact that no guardian ad litem was appointed for her under section 3255, Code of 1904, is no ground for reversing the decree. Cottrell *v.* Mathews, 847.

Laches.—Effect of insanity on doctrine of laches. Inge *v.* Inge, 329.

Mortgage and Deeds of Trust.—Where it is shown that the grantor was generally insane during a certain period, and a lucid interval is claimed at a particular time during that period, the burden of proof is on the party alleging such lucid interval to show sanity at that particular time. Inge *v.* Inge, 329.

Presumptions and Burden of Proof.—Burden of proof to show lucid interval. Inge *v.* Inge, 329.

INSOLVENCY. See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

Master and Servant.—Duty of master to inspect tools and appliances. Southern R. Co. *v.* Burford, 157.

INSTRUCTIONS.

Adverse Possession.—Omission to make any reference to the right of tacking possessions in an instruction is harmless, where the testimony is to the effect that the only possession claimed was that of the party himself. Christian *v.* Bulbeck, 74.

Appeal and Error.—Where instructions are contradictory and inconsistent, but the erroneous instructions were granted by the court at the instance of the party complaining of the instructions, he can not complain of that as error which could not possibly have injured his cause. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Burden of Proof.— See *infra*, "Presumptions and Burden of Proof."

Conflicting Instructions.—The court instructed the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiffs' bill of particulars, which had a peculiar value to plaintiffs, they must determine from all of the evidence what was the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the

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INSTRUCTIONS—Continued.

Conflicting Instructions—Continued.

cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof. Held: That this instruction was not in conflict with the previous instruction that the jury should not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Curative Effect of Instructions.—In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. If by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted and the instructions of the court, which clearly and accurately defined the duty of the city to be "to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exercising reasonable and ordinary care to avoid injury and danger while using the same." Richmond *v.* McCormack, 552.

In an action by a servant for personal injuries sustained while working upon a trestle, there was no mention of ice in the declaration but the evidence showed the formation of ice on the trestle. After plaintiff had rested defendant moved to exclude the evidence in regard to the ice. The jury were instructed: "The court further instructs the jury if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury they must find for the defendant." Held: Under these circumstances there was no error in the action of the court in this regard. Danville *v.* Lipford, 280.

Damages.—When an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But this general rule will not be carried so far as to reverse a judgment obtained upon a fair and otherwise regular trial, when the only error therein, tested by every reasonable probability, could not have affected the result in an amount

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INSTRUCTIONS—Continued.

Damages—Continued.

beyond that which would fall within the influence of the maxim, "De minimis lex non curat," Virginia Railway, etc, Co. *v.* Hill, 397.

Duty to Instruct—Self-Evident Proposition.—The trial court was asked to instruct the jury that they were not required to believe incredible testimony. As this instruction asserted a self-evident proposition, the refusal to give it was no error. Juries do not need, or at least must be presumed not to need, as a matter of instruction and information, to have the court tell them that they are not to believe the impossible. Virginia Railway, etc., Co. *v.* Hill, 397.

Evidence.—Instructions should be read with reference to the evidence in the case in which they are given. Christian *v.* Bulbeck, 74.

Fires.—*Conflicting Instructions.*—The court instructed the jury that in ascertaining the value of the family portraits, wearing apparel, and other articles mentioned in plaintiffs' bill of particulars, which had a peculiar value to plaintiffs, they must determine from all of the evidence what was the reasonable monetary value of such property taking into consideration the cost thereof, the possibility of replacing the same, the cost of replacing the same, where possible, and the plaintiffs' relation to such property and fix such proven value as will fairly compensate plaintiffs for the loss thereof. Held. That this instruction was not in conflict with the previous instruction that the jury should not take into consideration any sentimental value attached to the property by its owners. C. & O. R. Co. *v.* May, 790.

Joint Tort-Feasors.—If one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instruction simply tends to benefit the former without unduly inculpating the latter. Virginia Railway, etc., Co. *v.* Hill, 397.

Master and Servant.—In an action for personal injuries by a servant against his master, where the instructions deal with familiar principles, and those given by the court fully and fairly submit to the jury the theory of each party, an assignment of error to the action of the court in giving and refusing the instructions to the jury is without merit. Danville *v* Lipford, 280.

Must Be Applicable to Case.—Although correct with reference to a case to which they are applicable, instructions may be erroneous when applied to a different state of facts. Christian *v.* Bulbeck, 74.

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INSTRUCTIONS—Continued.

Must Be Based on Evidence.—An instruction that the jury before they could find for the city must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant, and if due to causes over which he had no control, he was not liable therefor, was properly refused, where there was no evidence as to causes over which the contractor had no control other than those expressly covered by other instructions. Such an instruction would invite the jury to indulge in mere conjecture as to such causes. Davis *v.* Newport News, 290.

It is not error to refuse an instruction where there is no evidence upon which it could properly be based. Richmond *v.* McCormack, 552.

Refusal of instruction where evidence upon which it was based was exceedingly meagre. Danville *v.* Lipford, 280.

The trial court is warranted in refusing to give an instruction, where there is no evidence upon which to base it. C. &. O. R. Co. *v.* May, 790.

Presumption and Burden of Proof.—In an action for personal injuries against a railroad company, the court, through inadvertence, failed to read an instruction to the jury, referring to the burden of proof, which the court at the request of the defendant intended to read. The court certified, however, that the case was argued before the jury by the opposing attorneys upon proper assumptions as to the burden of proof as stated in the instruction. Held: That while such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, yet as it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof, there is no reason to suppose that the railroad company was injured by the inadvertence of the judge. A. C. L. R. Co. *v.* Church, 725.

Refusal of Instruction Covered by One Given.—See *infra*, "Repetition of Instructions."

Repetition of Instructions.—An instruction that the jury before they could find for the city must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant, and if due to causes over which he had no control, he was not liable therefor, was properly refused, where there was no evidence as to causes over which the contractor had no control other than those expressly covered by other instructions. Such an instruction would invite the jury to indulge in mere conjecture as to such cases. Davis *v.* Newport News, 290.

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INSTRUCTIONS—Continued.

Repetition of Instructions—Continued.

An instruction may be refused which is covered by one already given. Danville *v.* Lipford, 280.

In an action for personal injuries by a servant against his master, where the instructions deal with familiar principles, and those given by the court fully and fairly submit to the jury the theory of each party, an assignment of error to the action of the court in giving and refusing the instructions to the jury is without merit. Danville *v.* Lipford, 280.

It is harmless error, if any, to refuse an instruction where another instruction given substantially embodies the same proposition of law as that contained in the instruction refused. Richmond *v.* McCormack, 552.

It is not error to refuse instructions prolix in their statements and less helpful to the jury than one given by the court, and in so far as they were proper, covered by other instructions given in the case. Virginia Railway, etc., Co. *v.* Hill, 397.

It was not error to refuse an instruction where the court had already given the jury eight instructions, covering two pages and a half of the printed record, which instructions sufficiently covered every phase of the case. A multiplication of instructions tends to confuse and not to aid the jury. Richmond *v.* McCormack, 552.

Refusal of an instruction as to the care to be exercised by a pedestrian in consideration of the darkness, where another instruction given by the court embodied the same proposition of law without emphasizing the darkness. Richmond *v.* McCormack, 552.

Where a case has been fairly submitted to the jury on proper instructions it is not error to refuse other instructions tendered. Christian *v.* Bulbeck, 74.

Streets and Highways.—Refusal of an instruction as to the care to be exercised by a pedestrian in consideration of the darkness, where another instruction given by the court embodied the same proposition of law without emphasizing the darkness. Richmond *v.* McCormack, 552.

Unnecessary Words.—Unnecessary words which could not have deceived the jury as to what the trial court meant did not render the instruction erroneous. Virginia Railway, etc., Co. *v.* Hill, 397.

Warranty.—In an action for breach of warranty the jury, while considering their verdict, returned to the court room and

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INSTRUCTIONS—Continued.

Warranty—Continued.

asked whether or not they were limited in deciding the case to the typewritten guarantee introduced in evidence. The court replied that they were not; that they "must take into consideration the oral evidence, the letters and written guarantee, and to decide from all the evidence what the contract was and a breach of it, if any, and the damages, if any." The typewritten guarantee was only a part of the evidence, but a material part, to be interpreted in the light of the circumstances under which it was given, the letters contemporaneously and subsequently written, the construction put upon it by the parties themselves, and the pertinent oral evidence indicating a breach or lack of breach. As the court could not have made any complete reply to the question without fully reinstructing the jury upon all the questions involved in the case, the reply of the court was not harmful. Standard Paint Co. v. E. K. Vietor & Co., 595.

INSURANCE.

Accident Insurance.—See ACCIDENT INSURANCE.

Deposit of Securities by Foreign Insurance Company.—A contract of reinsurance is not a policy within the Virginia insurance act. Shepherd *v.* Va. State Ins. Co., 383.

A deposit required by section 17 (chapter 2) of the Virginia insurance act (laws 1906, chap. 112) is for the protection of property owners in their fire insurance contracts, and not to protect other insurance companies on their contracts of reinsurance. Shepherd *v.* Va. State Ins. Co., 383.

Fire Insurance.—See FIRE INSURANCE.

General Agent.—The general agent of an insurance company, to whom policy holders have assigned their policies, stands on the same plane with all other holders of Virginia policies canceled by the insolvency of the company, and is entitled to share with them the benefits of his statutory lien on the securities held by the treasurer. Johnson *v.* Button, 339.

Upon the insolvency of a foreign insurance company, the proper place for a settlement between the company and its general agent for two States is in the suit in its home State for general liquidation of the company's business, and not in an ancillary proceeding in one of the other States. Johnson *v.* Button, 339.

Upon the insolvency of an insurance company, premiums collected by the receiver from sub-agents may be turned over to the general agent, instead of being held to await a settle-

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INSURANCE—Continued.

General Agent—Continued.

ment between all parties, where the general agent had the appointment of the sub-agents and was personally liable to the company for any balances that might be due from the sub-agents within his territory, and was under bond for the faithful performance of his contract. Johnson *v.* Button, 339.

Insolvency.—See *infra*, "General Agent."

The general agent of an insurance company, to whom policy holders have assigned their policies, stands on the same plane with all other holders of Virginia policies canceled by the insolvency of the company, and is entitled to share with them the benefits of his statutory lien on the securities held by the treasurer. Johnson *v.* Button, 339.

The insolvency of an insurance company *ipso facto* cancels its outstanding policies and entitles holders to "return premiums" upon the "pro rata" instead of upon the "short rate" basis. Johnson *v.* Button, 339.

Upon the insolvency of a foreign insurance company, the proper place for a settlement between the company and its general agent for two States is in the suit in its home State for general liquidation of the company's business, and not in an ancillary proceeding in one of the other States. Johnson *v.* Button, 339.

Upon the insolvency of an insurance company, premiums collected by the receiver from sub-agents may be turned over to the general agent, instead of being held to await a settlement between all parties, where the general agent had the appointment of the sub-agents and was personally liable to the company for any balances that might be due from the sub-agents within his territory, and was under bond for the faithful performance of his contract. Johnson *v.* Button, 339.

Where an insurance company, after writing numerous policies, becomes insolvent, it can not demand a return of a proportionate part of the commissions of its agents, on policies cancelled at the time of the receivership, there being no custom requiring the return of commissions as in case of surrender, and the company not being entitled to profit by its own default. Johnson *v.* Button, 339.

Policy.—Whether contracts of reinsurance are policies. Shepherd *v.* Va. State Ins. Co., 383.

Reinsurance.—A domestic insurance company, holding a contract of reinsurance on risks outside of this State with a foreign company doing business in this State, is not en-

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INSURANCE—Continued.

Reinsurance—Continued.

titled, in case of the latter's insolvency, to be classed as a policy holder and lienor under the provisions of section 17 (chapter 2) of the Virginia insurance act (laws 1906, c. 112). Shepherd *v.* Va. State Ins. Co., 383.

INTEREST.

Payment of Interest in Advance.—See BILLS, NOTES AND CHECKS.

Taxation.—See TAXATION.

Usury.—See USURY.

When Allowed in Actions on Contracts.—In Minor's Inst., Vol. 4, part 1 (ed. 1878), p. 739, it is said that "when the action is founded upon a promise, express or implied, to pay money at a given day, interest on the principal sum from that day is a legal incident of the debt, and the right to it founded on the presumed intention of the parties. It is further the established doctrine with us, that wherever there is thus a contract, express or implied, to pay interest, the obligation extends to the payment of the interest, as well as of the principal sum, and neither courts nor juries have, or ever had, the arbitrary power to dispense with the performance of either branch of the contract." Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Section 3390 of the Code of Virginia is as follows: "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action, whether on contract or tort, the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which interest shall commence." The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon the general assumpsit. Under all the circumstances of the case, the statute above quoted applied, and the jury had the right, in their discretion, to fix the date from which the interest should begin to run. Consequently, a peremptory instruction of the lower court to the jury that if they found for the plaintiff they should allow interest from the time the plaintiff's demand accrued, under the terms of the contract, was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

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INTERPRETATION AND CONSTRUCTION.

Construction by Parties.—No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves. Holland *v.* Vaughan, 324.

Contracts.—See CONTRACTS.

Deeds.—See DEEDS.

Ejusdem Generis.—In the case in judgment, the contract provides that the defendant "shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages." Held: The words "or by any other cause which is unavoidable or beyond its reasonable control" should be restricted to causes of like nature with those enumerated, but the clause "or, in any event, for consequential damages" should not be so restricted, and the defendant should be exempt from "consequential damages" whether of like nature or not. Wash. & O. D. Ry. *v.* Westinghouse Co 620.

The *ejusdem generis* rule is invoked only for the purpose of ascertaining the intent and meaning of the language under consideration, and should not be applied so as to do violence to the language employed in the instrument. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Under the *ejusdem generis* rule, applicable to the construction of written instruments, if a contract specifically enumerating losses from which a party is to be exempt is followed by words of general classification, the general words will be construed to mean other losses of the same kind as those enumerated. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

Questions of Law and Fact.—Duty of court to construe written instruments. Lawson *v.* Hobbs, 690.

It is the duty of the court to construe written instruments, when the writing is complete in itself and the subject matter of it is certain or the facts are ascertained. Ewell *v.* Brock, 475.

Statutes.—See STATUTES.

Wills.—Questions of law and fact. Ewell *v.* Brock, 475.

INTERSTATE COMMERCE.

Limitation of Liability.—Common carriers may limit their liability in interstate commerce by regulations contained in their

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INTERSTATE COMMERCE—Continued.

Limitation of Liability—Continued.

published tariffs filed with and approved by the Interstate Commerce Commission, and such regulations supersede State statutes and policies and furnish the exclusive rules for determining the carriers' liability. Western U. Tel. Co. *v.* Bolling, 413.

Telegraphs and Telephones.—Telegraph and telephone companies are common carriers under the express provisions of the act of Congress to regulate commerce. Western U. Tel. Co. *v.* Bolling, 413.

The transmission of intelligence by wire is commerce, either State or interstate. Western U. Tel. Co. *v.* Bolling, 413.

The transmission of telegraphic messages between points within the State, which, in the course of their transmission, pass without the State into another State, or the District of Columbia, is interstate commerce. Western U. Tel. Co. *v.* Bolling, 413.

Where a telegraphic message between two points in the State is transmitted to a point without the State and from there relayed to the point of delivery within the State, this constitutes interstate commerce, although it was possible to have sent the message between the two points without its leaving the State. Western U. Tel. Co. *v.* Mahone, 422.

Where telegraph companies undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, these conditions, until disapproved by the Interstate Commerce Commission, furnish the exclusive rules for determining their liability, subject to the federal statutes and general law, any State statute to the contrary notwithstanding. Western U. Tel. Co. *v.* Bolling, 413.

Whether the statutory penalty (Code, 1904, section 1294-h, clauses 5, 6) may be enforced in clear cases of negligence occurring within this State where the message is interstate commerce. Western U. Tel. Co. *v.* Bolling, 413.

JEOFAILS. See AMENDMENTS.

JOINDER. See ACTIONS.

JOINT DEPOSIT. See BANKS AND BANKING.

JOINT OR SEVERAL CONTRACTS. See CONTRACTS.

JOINT TORT-FEASORS.

In an action against a street railway by a passenger in a taxicab for injuries incurred by a collision between the taxicab and

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JOINT TORT-FEASORS—Continued.

In An Action Against a Street Railway—Continued.

a street car, the court refused to instruct the jury as to the duty owed by the taxicab company to its passenger. Held: No error. So long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its defendant. Virginia Railway, etc., Co. *v.* Hill, 397.

Instructions.—If one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instruction simply tends to benefit the former without unduly inculpating the latter. Virginia Railway, etc., Co. *v.* Hill, 397.

JUDGMENTS AND DECREES.

Arrest of Judgment.—In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. The allegation of duty was merely surplusage, and under the provisions of sections 3246, 3449 and 3272, Code 1904, directing the court to disregard formal defects in pleading, it was no ground for a motion in arrest of judgment. Richmond *v.* McCormack, 55 .

Confession of Judgments.—See CONFESSION OF JUDGMENTS.

Judicial Sales.—See JUDICIAL SALES AND RENTINGS.

Mortgages and Deeds of Trust.—*Decree Directing Release of Deed.* See MORTGAGES AND DEEDS OF TRUST.

Void Judgment or Decree.—See JUDICIAL SALES.

Warrant of Attorney.—See CONFESSION OF JUDGMENTS.

JUDICIAL SALES.

Infants' Lands.– See INFANTS.

Void Judgment and Decree.—Section 3425, Code of 1904, does not protect a sale under a totally void decree. Brenham *v.* Smith, 30.

JURISDICTION.

Chancery.—See *infra*, "EQUITY JURISDICTION."

Equity Jurisdiction.—*Claims Against Estate.*—Where a court of equity in three chancery causes has taken the management and control of the whole corpus of a trust estate and in a fourth cause has taken jurisdiction to partition and distribute the realty and personalty of the estate, the court has un-

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JURISDICTION—Continued.

Equity Jurisdiction—Continued.

questionable primary jurisdiction as a court of equity of a claim against one of the beneficiaries to the extent that such claim is an equitable lien on his interest in the estate under the control of the court. Brown *v.* Ford, 233.

Where the contingent interest of a deceased beneficiary before the death of the life tenant was vested in a claimant, charged by the agreement with the payment of the deceased beneficiary's liabilities, and this agreement was embodied in a consent decree of a chancery court entered in pending suits for the settlement and division of the trust estate, the chancery court had primary jurisdiction of appellant's claim against the deceased beneficiary. Brown *v.* Ford, 233.

Fiduciary Relations, Trusts and Powers.—Complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleged profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction. Clay's Adm'r *v.* Kelly, 437.

Lost Instruments and Records.—See LOST INSTRUMENTS AND RECORDS.

Reformation of Instruments.—Mistake may be shown by parol, but evidence must be clear and convincing. Holland *v.* Vaughan, 324.

The jurisdiction of a court of equity to reform written instruments is well settled. Holland v. Vaughan, 324.

While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Holland *v.* Vaughan, 324.

Resort to Court for Advice.—Resort of trustee, executor or administrator to court for direction and advice. Williams *v.* Bond, 678; Shepherd *v.* Darling, 586.

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JURISDICTION—Continued.

Equitable Liens—Continued.

Retention of Jurisdiction for Complete Relief.—The jurisdiction of a court of equity, having once acquired jurisdiction of a cause on equitable grounds, to go on to grant complete relief, even to the extent of establishing legal rights and enforcing legal remedies, such as rendering personal decrees for money, damages for breach of contract, etc., is well settled. Brown *v.* Ford, 233.

Lost Instruments and Records.—See LOST INSTRUMENTS AND RECORDS.

Reformation.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

State.—A state can only be sued by a citizen upon such terms as it is pleased to prescribe, and the Circuit Court of the city of Richmond alone has been given jurisdiction of suits for injunctions involving State taxes. Commonwealth *v.* Ferris Co., 827.

JURY. See QUESTIONS OF LAW AND FACT.

Boundaries.—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. Collier *v.* Hiden, 453.

Waiver.—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. Collier *v.* Hiden, 453.

KINDRED.

The word "kindred," as used in section 2556, of the Code of 1904, has the meaning of next of kin. Bonewell *v.* Smith, 431.

LACHES.

Act of Defendant.—Where the delay asserted as laches of plaintiff is caused by fault of defendant. Brown *v.* Ford, 233.

Equitable Liens.—Where the beneficiaries of an estate had agreed to make the corpus of the estate a security for a claim, and

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LACHES—Continued.

Equitable Liens—Continued.

it clearly appeared that delay in bringing the agreement with claimant to the attention of the court below was not the fault of the claimant, but of the parties who made the agreement with him, who expressly undertook, in effect, to bring the agreement to the attention of the court and obtain such action of the court as might be necessary to perfect the lien in favor of the claimant, the doctrine of laches does not apply. Brown *v.* Ford, 233.

General Rule.—Whenever the delay fairly justifies the inference of acquiescence in the adverse claim, or whenever it has been of such a character as to induce other persons to alter their circumtances or conduct, so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar. Inge *v.* Inge, 329.

Insanity.—Effect of insanity on doctrine of laches. Inge *v.* Inge, 329.

Mortgages and Deeds of Trust.—Where a remainderman gives a deed of trust enforceable upon the death of the life tenant no presumption arises against the validity of the deed of trust from a failure of the creditors to assert their debts before the death of the life tenant. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Nuisances.—Pollution of stream. Magruder *v.* Va.-Car. Chem. Co., 352.

Reformation of Instruments.—Burden of proof of showing laches, acquiescence or ratification upon defendant. Inge *v.* Inge, 329.

Scarcely a year elapsed after complainant learned of the mistake until she became ill and mentally incompetent to protect her interests, and remained so practically all the time until shortly before this suit was brought. Held: To preclude the doctrine of laches. Inge *v.* Inge, 329.

LANDLORD AND TENANT.

Holding Over.—A tenant holding over where at the expiration of the year he was compelled to hold over for three days because, although he endeavored to obtain them, he was unable to get wagons to move his effects. On the fourth day he vacated the premises, and sent the keys to the landlady's agents. The landlady then elected to hold the tenant as a tenant from year to year by reason of his having held over as aforesaid. Held: That a tenant holding over under these circumstances did not create a new tenancy from year to year. Grice *v.* Todd, 481.

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LANDLORD AND TENANT—Continued.

Holding Over—Continued.

Where a notice is given by a tenant of an intention to vacate under the Virginia statute (Code, section 2785) before his lease expires, such notice does not differentiate the case from any holding over by a tenant after the expiration of his term, where the holding over is after the date named in the notice when the premises should have been vacated. Grice v. Todd, 481.

Presumption of a tenancy from holding over is rebuttable. Grice v. Todd, 481.

Tenant holding over involuntarily after notice to landlord that he would vacate at the expiration of the year. Grice v. Todd, 481.

Where the tenant's holding over was not voluntary, a contract of tenancy from year to year could not be implied, as no obligation will be implied in law from an act which is not voluntary. Grice v. Todd, 481.

Notice of Intention to Vacate.—Where a notice is given by a tenant of an intention to vacate under the Virginia statute (Code, section 2785) before his lease expires, such notice does not differentiate the case from any holding over by a tenant after the expiration of his term, where the holding over is after the date named in the notice when the premises should have been vacated. Grice v. Todd, 481.

Tenancy from Year to Year.—Tenant holding over involuntarily after notice to landlord that he would vacate at the expiration of the year. Grice v. Todd, 481.

Where the tenant's holding over was not voluntary, a contract of tenancy from year to year could not be implied, as no obligation will be implied in law from an act which is not voluntary. Grice v. Todd, 481.

Tenancy Implied from Holding Over.—See *infra*, "Holding Over."

LARCENY.

Variance.—An indictment alleged the larceny of money by false pretenses, whereas the proof showed the larceny of a check afterwards cashed by defendant. Held: That in every real sense money was paid to the accused, and, therefore, the charge in the indictment was substantially proven. Lewis' Case, 875.

Upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment. Lewis' Case, 875.

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LAST CLEAR CHANCE.

Doctrine of.—Passenger alighting from street car. Virginia Trust Co. *v.* Raymond, 674.

LAW OF THE ROAD. See STREETS AND HIGHWAYS.

LEASE. See LANDLORD AND TENANT.

LEGAL CONCLUSIONS.

Allegation of Duty.—An allegation of duty is only a conclusion of law; and, where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause, the declaration ought to be sustained. Richmond *v.* McCormack, 552.

Malicious Prosecution.—The allegation in a declaration in an action for malicious prosecution that the prosecution was without probable cause, is not merely the assertion of a conclusion of law. It is the allegation of an ultimate fact. Klaff *v.* Virginia R., etc., Co., 347.

LEGITIMACY. See BASTARDY.

LICENSES.

Power of Municipalities.—The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. Norfolk *v.* Griffin, 524.

The power of a municipality to divide a single taxable privilege, such as the right to conduct the business of a contractor, as classified and defined for the purpose of State taxation in the form of a State license, into several businesses, such as painters, decorators, builders, etc., so as to require several separate city licenses, one for each of the elements of right named in the city ordinance, which all accrue to the citizen under one State license. Norfolk *v.* Griffin, 524.

Uniformity.—Norfolk *v.* Griffin, 524.

LIENS.

Equitable Liens.—*After-Acquired Property.*—An equitable lien upon property, to be acquired in the future, is valid and enforceable. Brown *v.* Ford, 233.

Creation of Equitable Lien.—An executory agreement on the part of a beneficiary to make the whole corpus of a trust estate a security for a debt, operates to create an equitable lien on the beneficiary's interest in such estate. That the interest of the beneficiary is not vested but contingent is im-

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LIENS—Continued.

Equitable Liens—Continued.

Creation of Equitable Lien—Continued.

material; when the contingent interest becomes vested the equitable lien attaches. Brown *v.* Ford, 233.

General rule as to the creation of equitable liens upon real property. Brown *v.* Ford, 233.

Verbal lien as creating an equitable lien upon personal property. Brown *v.* Ford, 233.

Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, enforced upon the principle that equity will treat that as done which, by agreement, is to be done. Brown *v.* Ford, 233.

Laches.—Laches in assertion of equitable liens. Brown *v.* Ford, 233.

Jurisdiction.—Where a court of equity in three chancery causes has taken the management and control of the whole corpus of a trust estate and in a fourth cause has taken jurisdiction to partition and distribute the realty and personalty of the estate, the court has unquestionable primary jurisdiction as a court of equity of a claim against one of the beneficiaries to the extent that such claim is an equitable lien on his interest in the estate under the control of the court. Brown *v.* Ford, 233.

Where the contingent beneficiaries of a trust estate contracted to make such an estate a security for a debt, their personal liability does not arise until there is a failure to give a lien on the estate as promised. This they can not do until their contingent interests become vested. Therefore, the statute of limitations does not begin to run until the vesting of such contingent interests. Brown *v.* Ford, 233.

LIMITATION OF ACTIONS. See ADVERSE POSSESSION; LACHES.

Equitable Liens.—Where the contingent beneficiaries of a trust estate contracted to make such an estate a security for a debt, their personal liability does not arise until there is a failure to give a lien on the estate as promised. This they can not do until their contingent interests become vested. Therefore, the statute of limitations does not begin to run until the vesting of such contingent interests. Brown *v.* Ford, 233.

Nuisances.—Limitation where there is a permanent nuisance. Magruder *v.* Va.-Car. Chem. Co., 352; Norfolk Co. Water Co. *v.* Etheridge, 379.

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LIMITATION OF ACTIONS—Continued.

Usury.—In actions to recover the penalty given by section 5198, U. S. Rev. Stats., the two-year period of limitation begins to run from each actual payment of usurious interest. Baker *v.* Lynchburg Nat. Bank, 208.

Limitation of time within which defense, given by section 5198, U. S. Revised Statutes, may be made by debtor. Baker *v.* Lynchburg Nat. Bank, 208.

The period of limitation upon the time within which suit must be brought to recover the penalty under section 5198 of U. S. Rev. Stats., begins to run from the date of each payment of interest and not from the payment of the whole debt. Baker *v.* Lynchburg Nat. Bank, 208.

LOANS.

Usury.—See USURY.

LOST INSTRUMENTS AND RECORDS.

Deeds.—Insufficient evidence to establish. Dunnavant *v.* Dunnavant, 301.

Jurisdiction of equity to set up lost deed. Dunnavant *v.* Dunnavant, 301.

Evidence.—Clear and most stringent proof required before courts will establish a title by parol testimony. Dunnavant *v.* Dunnavant, 301.

General rule as to sufficiency of evidence. Dunnavant *v.* Dunnavant, 301.

Insufficient evidence to establish a lost deed. Dunnavant *v.* Dunnavant, 301.

Jurisdiction of Equity.—Dangerous jurisdiction that will not be lightly exercised. Dunnavant *v.* Dunnavant, 301.

General rule as to jurisdiction of equity to set up lost deed. Dunnavant *v.* Dunnavant, 301.

Wills.—Jurisdiction of equity to set up lost will. Dunnavant *v.* Dunnavant, 301.

MALICIOUS PROSECUTION.

Declaration.—See *infra*, "Probable Cause."

Legal Conclusions.—The allegation in a declaration in an action for malicious prosecution that the prosecution was without probable cause, is not merely the assertion of a conclusion of law. It is the allegation of an ultimate fact. Klaff *v.* Virginia R., etc., Co., 347.

Pleading.—See *infra*, "Probable Cause."

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MALICIOUS PROSECUTION—Continued.

Probable Cause.—A declaration in an action for malicious prosecution charged that the defendant maliciously and without any reasonable or probable cause instigated and procured the plaintiff to be indicted and tried for grand larceny; and that upon the trial plaintiff was acquitted and the prosecution finally ended. Held: That this declaration was sufficient; and that it is not necessary where the declaration discloses an indictment by a grand jury, in addition to alleging a want of probable cause, to set out the evidence upon which that averment is predicated. Klaff v. Virginia R., etc., Co., 347.

Where, however, plaintiff was convicted of the crime for which he was prosecuted, a different principle applies. In case of conviction the presumption of the existence of probable cause is not merely *prima facie*, but conclusive unless the conviction is alleged and proved to have been procured by the defendant through fraud or by means of evidence which he knew to be false. Klaff v. Virginia R., etc., Co., 347.

MAP. See PLAT.

MARRIAGE. See SLAVES.

Annulment of Marriage.—See DIVORCE.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

Action for Injuries.—*Declaration.*—See *infra*, "Declaration."

Amendments.—In an action by a servant against his master for a wrongful discharge, it was urged by the defendant that the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contained only the common counts in assumpsit. Held: Conceding that the declaration was defective, it was the duty of the defendant, if he intended to rely upon that point, to then and there call the court's attention to it. Conrad v. Ellison-Harvey Co., 458.

Assumpsit.—Upon a wrongful discharge of a servant his appropriate remedy is assumpsit. Conrad v. Ellison-Harvey Co., 458.

Assumption of Risk.—A sand shoveler held to have assumed the risk of injuries from the falling of a clod of mixed clay and sand near the top of the bank beneath which he was working. Norfolk & W. R. Co. v. Tucker's Admx., 540.

The defense of assumed risk is open to the master, where the cause of action is under the federal employers' liability act. Norfolk & W. R. Co. v. Tucker's Admx., 540.

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MASTER AND SERVANT—Continued.

Assumption of Risk—Continued.

A servant assumes the risk of open and obvious dangers of which he has knowledge, or where his opportunity for knowledge is so complete as to leave no room for doubt that he either knew or ought to have known all about them. Southern R. Co. *v.* Burford, 157.

Declaration.—A declaration in an action of a servant against his master which sets forth sufficient facts to show the relation between the plaintiff and the defendant, the legal duty owing from one to the other, the breach of that duty by the defendant, and the damages resulting therefrom to the plaintiff, is good on demurrer. Millboro Lumber Co. *v.* Donald, 150.

Discharge of Servant.—In an action of assumpsit by a servant against his master to recover on account of his salary for the balance of the year upon a wrongful discharge, where the evidence tended to show that the master had secretly determined to drop the servant, and in effect had done so, the question whether he was discharged or quit of his own accord, is one for the jury to answer. Conrad *v.* Ellison-Harvey Co., 458.

Upon a wrongful discharge of a servant his appropriate remedy is assumpsit. Conrad *v.* Ellison-Harvey Co., 458.

Duration of Contract of Hiring.—Plaintiff was originally hired for a fixed term of one year. He held over for several succeeding years without any new agreement. The only change ever made was one increase of salary. Held: That the question of whether he was employed at the time of his discharge by the month or by the year was for the jury. Conrad *v.* Ellison-Harvey Co., 458.

The English rule is that every general hiring is presumed to be for one year, in the absence of stipulations or circumstances to rebut the presumption. In the United States the prevailing doctrine is that every such general hiring is terminable at the will of the parties. Both in England and in this country, however, when one enters the employment of another for a definite period (of one year or less) and continues in that employment after the expiration of that period without any new agreement, the presumption, rebuttable of course by evidence, is that he is again employed for a like term. Conrad *v.* Ellison-Harvey Co., 458.

The plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in deter-

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MASTER AND SERVANT.—Continued.

Duration of Contract of Hiring—Continued.

mining the probable intention of the parties in continuing the relationship after the first year had expired. After the end of each year, the employment continued, some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. Conrad *v.* Ellison-Harvey Co., 458.

Duty in Regard to Inspection and Repair.—The master is under no obligation to his servant to inspect, during their use, those common tools and appliances with which every one is conversant, nor to repair defects arising in the daily use of such appliances. Southern R. Co. *v.* Burford, 157.

Duty to Warn or Instruct Servant.—It is the duty of the master to adequately warn an inexperienced servant of unknown dangers attendant upon the place and work to which he is assigned. Bristol Tel. Co. *v.* Stockton's Adm'r, 42.

Employers' Liability Act.—See *infra*, "Federal Employers' Liability Act."

Evidence.—In an action by an employee against his employer for wrongful discharge, the original contract of hiring made several years before was admissible for the purpose of showing the terms of the original hiring. Conrad *v.* Ellison-Harvey Co., 458.

The plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in determining the probable intention of the parties in continuing the relationship after the first year had expired. After the end of each year, the employment continued, some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. Conrad *v.* Ellison-Harvey Co., 458.

Federal Employers' Liability Act.—Defendant's railroad tracks were crossed by those of the Southern Railway. In consideration of the privilege of crossing, and in accordance with section 1294-d (37), Code of 1904, the Southern Railway agreed to provide at its cost "such watchman, watch boxes,

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MASTER AND SERVANT.—Continued.

Federal Employers' Liability Act—Continued.

signals, approaches, and safe guards" as its manager or superintendent might deem proper and necessary. In compliance with this agreement, the Southern Railway erected at the crossing a signal tower and it assumed the duty of supplying and paying the operators in the tower and also the employees who lit the lamps required for the proper operation of the interlocking plant by night. The employees rendered certain services to defendant, among others keeping certain lights in order, which served as signals for defendant's trains only and not for those of the Southern Railway Company. Plaintiff's intestate was one of the operators of the signals and it was also his duty to keep one of the defendant's signal lights aforesaid in order; and while engaged in his duty of attending to this light was killed through the negligence of the defendant. Held: That plaintiff's intestate was an employee of defendant, within the meaning of that term as used in the Federal employers' liability act. A. C. L. R. Co. *v.* Tredway's Admx., 735.

In an action by a servant's administratrix against his master, alleging that the servant's death was caused by the master's negligence, the declaration contained two counts, one setting out a cause of action under the laws of this State, and the other a cause of action under the Federal employers' liability act. The trial court required the plaintiff to elect upon which count she would proceed. As she chose to proceed under the latter, the defense of assumed risk was open to the master. Norfolk & Western R. Co. *v.* Tucker's Admx., 540.

The failure of the Congress to define the meaning of the words "employed" and "employee" manifests a purpose in the legislation in question that these words should be interpreted and understood in their ordinary sense and according to their usage in the law of master and servant. That is to say, the relationship of employer and employee is the same as that of master and servant. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Fellow Servants.—See FELLOW SERVANTS.

Frauds, Statute of.—A servant was employed under a written contract for one year, beginning on January 1st, and afterwards continued in his employment from year to year without any other contract in writing, until his discharge on June 30, 1914. Held: That his contract for 1914 was based upon implication and presumption drawn in part from previous dealings between the parties, but it was nevertheless a new

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MASTER AND SERVANT.—Continued.

Frauds, Statute of—Continued.

contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for one year's service, to begin and be performed within the year, and consequently not within the statute of frauds. Conrad *v.* Ellison-Harvey Co., 458.

General and Special Master.—A servant may be transferred from his service for one master—who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master—to the service of another person other than his general master; in which case—(1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil one of those duties which the law imposes upon masters for the benefit and protection of their servants. A. C. L. R. Co. *v.* Tredway's Admx., 735.

General Rule as to Master's Liability for Injuries. The master is not an insurer of the servant's safety, and is liable for the consequences, not of danger, but of negligence. Bristol Tel. Co. *v.* Stockton's Adm'r, 42.

Imputable Negligence.—The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. Virginia R. & P. Co. *v.* Gorsuch, 655.

Inspection.—See *infra*, "Duty in Regard to Inspection and Repair."

Instructions.—In an action for personal injuries by a servant against his master, where the instructions deal with familiar principles, and those given by the court fully and fairly submit to the jury the theory of each party, an assignment of error to the action of the court in giving and refusing the instructions to the jury is without merit. Danville *v.* Lipford, 280.

Liability of Master to Servant for Personal Injuries.—*Assumption of Risk by Servant.*—See *infra*, "Assumption of Risk by Servant."

Duty in Regard to Inspection and Repair.—See *infra*, "Duty in Regard to Inspection and Repair."

Fellow Servants.—See FELLOW SERVANTS.

Vice-Principal.—See FELLOW SERVANTS.

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MASTER AND SERVANT.—Continued.

Negligence.—See *infra*, "Railroads."

New Trials.—A verdict for a servant in an action for personal injuries will not be set aside, although there is much in the evidence tending to show that the servant's injury was due to a mere accident, where there is also evidence sufficient to sustain the finding of the jury to the contrary. Danville *v.* Lipford, 280.

Non-Assignable Duties.—A servant may be transferred from his service for one master—who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master—to the service of another person other than his general master; in which case—(1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil one of those duties which the law imposes upon masters for the benefit and protection of their servants. A. C. L. R. Co. *v.* Tredway's Admx., 735.

The duties of the plaintiff's intestate in tending signals and lights of defendant were non-assignable duties. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Obedience of Servant.—The promise of the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law, and he must obey unless the act be one obviously attended by such danger that a man of common prudence would not undertake it. Millboro Lumber Co. *v.* Donald, 150.

Obvious Dangers.—See *infra*, "Assumption of Risk by Servant."

Presumptions and Burden of Proof.—In an action to recover for a negligent injury, the burden is on the plaintiff to prove the negligence alleged. Bristol Tel. Co. *v.* Stockton's Adm'r, 42.

In the absence of evidence to the contrary, the master is presumed to have discharged his affirmative duties to his servant in furnishing him a reasonably safe place and appliances in and with which to work, and also in giving him necessary warning and instruction. Bristol Tel. Co. *v.* Stockton's Adm'r, 42.

Negligence of the master can not be inferred from the mere occurrence of the accident by which his servant is injured. Bristol Tel. Co. *v.* Stockton's Admr., 42.

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MASTER AND SERVANT.—Continued.

Questions of Law and Fact.—In an action of assumpsit by a servant against his master to recover on account of his salary for the balance of the year upon a wrongful discharge, where the evidence tended to show that the master had secretly determined to drop the servant, and in effect had done so, the question whether he was discharged or quit of his own accord, is one for the jury to answer. Conrad *v.* Ellison-Harvey Co., 458.

Plaintiff was originally hired for a fixed term of one year. He held over for several succeeding years without any new agreement. The only change ever made was one increase of salary. Held: That the question of whether he was employed at the time of his discharge by the month or by the year was for the jury. Conrad *v.* Ellison-Harvey Co., 458.

Railroads.—Plaintiff's intestate, a signalman, after he had set a stop signal against a train, was struck and killed by such train, which disregarded the signal while he was tending another light. The stop signal was plainly visible to the engineer of the train. Held: That defendant railroad was guilty of negligence. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Relationship of Master and Servant.—And were the service not accepted as that of a servant, and, by express agreement or otherwise, the master were to attempt to escape responsibility by relinquishing control of the servant—where the duty is non-assignable—the master can not escape the duty resting upon him by relinquishment of control of the servant, or by otherwise making it impossible for himself to perform the duty. And the duty is non-assignable when it pertains to the operation of a completed railway of a common carrier. A. C. L. R. Co. *v.* Tredway's Admx., 735.

A servant may be transferred from his service for one master—who may have made the express contract of employment of the servant and may pay the latter his wages, and be his general master—to the service of another person other than his general master; in which case—(1) The special master is alone liable to third persons for injuries caused by such acts as the special servant may commit in the course of his employment; (2) the special servant must look to the special master for his indemnity, if he is injured, while the stipulated work is in progress, by dangerous conditions resulting from the special master's failure to fulfil one of those duties which the law imposes upon masters for the benefit and protection of their servants. A. C. L. R. Co. *v.* Tredway's Admx., 735.

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MASTER AND SERVANT.—Continued.

Relationship of Master and Servant—Continued.

At common law, upon the question of whether the relationship of master and servant exists, there are four elements which are considered: (1) Selection and engagement of the servant; (2) payment of wages; (3) power of dismissal; and (4) the power of control of the servant's action. Where all of these elements co-exist in one person alone, that person is without doubt the master of the person engaged. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Where the duties of the master are non-assignable, the power of control of the servant's action is not the ultimate fact which determines the relationship of master and servant. The ultimate facts are, was the person in question engaged in the discharge of the duties of a servant of another, and was that service accepted by that other—was such service rendered and accepted? If so, the law implies the contract of master and servant between the latter and the former—of employer and employee—and the existence of that relationship between them. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Repair.—See *infra*, "Duty in Regard to Inspection and Repair."

Safe Place to Work.—A sand shoveler held to have assumed the risk of injuries from the falling of a clod of mixed clay and sand near the top of the bank beneath which he was working. Norfolk & W. R. Co. *v.* Tucker's Admx., 540.

Vice-Principal.—See FELLOW SERVANTS.

MASTER IN CHANCERY.

Report.—The report of a commissioner, especially when the evidence has been taken in his presence, is entitled to great weight, and should not be disturbed unless its conclusions are clearly at variance with the result of the evidence. Cottrell *v.* Mathews, 847.

MINORS. See INFANTS.

MISTAKE.

Adverse Possession.—See *infra*, "Boundaries."

Assumpsit.—Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover. Norfolk *v.* Norfolk County, 356.

Boundaries.—Where the proof is that the location of the line in question was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the

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MISTAKE—Continued.

Boundaries—Continued.

case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use and claim as his own the land up to a particular and definite line of the ground. Christian v. Bulbeck, 74.

Whether adverse possession exists where a party occupies land through a mistake as to his boundary. Christian v. Bulbeck, 74.

Deeds.—*Reformation of Instruments.*—*See* RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Reformation of Instruments.—See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Taxation.—Action of assumpsit by city against county to recover taxes paid through mistake to county. Norfolk v. Norfolk County, 356.

Vendor and Purchaser.—In contracts of sale by the acre, a court of equity holds the vendor liable for a deficiency on the ground of mistake. Motley v. Hodges, 498.

MONEY HAD AND RECEIVED. See ASSUMPSIT.

MORTGAGES AND DEEDS OF TRUST.

Consideration.—Contradictory statements of the grantor of a deed of trust as to the consideration of the deed supply no affirmative proof tending to show that such consideration was lacking. Murphy's Hotel Co. v. Herndon's Admr., 505.

Under section 24 (Code 1904, section 2841-a) of the negotiable instruments law of Virginia, a deed of trust and notes secured by it are *prima facie* evidence of a valuable consideration, in the absence of affirmative evidence of lack of consideration. Murphy's Hotel Co. v. Herndon's Admr., 505.

Decree Directing Release of Deed.—A decree of court directing the release of a deed of trust to secure notes payable to the holder or holders thereof could not be valid, unless based upon some pleadings putting in issue before the court whether there was or were any holder or holders of such notes. The existence of an issue in a cause is essential to the exercise of the jurisdiction of the court. There must be some proceeding by which the issue between the parties in interest is presented to the court for decision, and, moreover, all such parties must be given an opportunity to be heard thereon. An *exparte* report of a special commissioner is not a pleading tendering such an issue. Murphy's Hotel Co. v. Herndon's Admr., 505.

A void decree of court directed the trustee in a deed of trust to release the deed. The trustee's deed of release showed on

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MORTGAGES AND DEEDS OF TRUST—Continued.

Decree Directing Release of Deed—Continued.

its face that the trustee did not act of his own volition, but under a decree of court, which decree was referred to. The release deed further referred to the report of an *ex parte* special commissioner for the facts on which the decree was based. The release deed itself, of record, therefore, put every subsequent purchaser for value and creditor upon notice of what an examination of the papers and proceedings in the suits would have disclosed, namely, that the decree was void and the release deed a nullity. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Where the holders of notes secured by a deed of trust were not made parties to the suit, or given notice thereof, a decree directing a release of the deed is void. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Deficiency in Quantity.—The purchaser at a trustee's sale can not maintain, against the beneficiary and trustee in an ordinary deed of trust on land to secure debts, a suit for a deficiency in acreage. In such transaction there is no element of guaranty or warranty, either of title or quantity of the land. To such a sale the principle of *caveat emptor* applies. Motley *v.* Hodges, 498.

Delivery of Notes.—Upon suit to enforce a deed of trust the delivery or nondelivery of the notes secured by it is immaterial. The deed of trust is in itself sufficient evidence of the existence of the debts, in the absence of any proof of their payment subsequent to its delivery. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Equitable Mortgages.—An equitable lien upon property, to be acquired in the future, is valid and enforceable. Brown *v* Ford, 233.

General rule as to the creation of equitable liens upon real property. Brown *v.* Ford, 233.

Laches in assertion of equitable liens. Brown *v.* Ford, 233.

Verbal lien as creating an equitable lien upon personal property. Brown *v.* Ford, 233.

Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, enforced upon the principle that equity will treat that as done which, by agreement, is to be done. Brown *v.* Ford, 233.

Where a court of equity in three chancery causes has taken the management and control of the whole corpus of a trust estate and in a fourth cause has taken jurisdiction to parti-

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MORTGAGES AND DEEDS OF TRUST—Continued.

Equitable Mortgages—Continued.

tion and distribute the realty and personalty of the estate, the court has unquestionable primary jurisdiction as a court of equity of a claim against one of the beneficiaries to the extent that such claim is an equitable lien on his interest in the estate under the control of the court. Brown *v.* Ford, 233.

Where the contingent beneficiaries of a trust estate contracted to make such an estate a security for a debt, their personal liability does not arise until there is a failure to give a lien on the estate as promised. This they can not do until their contingent interests become vested. Therefore, the statute of limitations does not begin to run until the vesting of such contingent interests. Brown *v.* Ford, 233.

Estoppel.—J. and L., father and son, gave a deed of trust, which provided that the trustee should "sell first the lands conveyed by J. and, if a sufficient amount is derived to pay the debt and costs, will not make further sale." Subsequently, L. conveyed his land in trust to secure other creditors, some of whose debts were contracted after the recordation of the first deed and upon the faith of the above quoted statement therein contained, but who made no inquiry of J. as to the relation of himself and L. concerning the joint debt above mentioned. Held: That J. was not estopped from showing by other clauses of the deed and extrinsic evidence that he was primarily bound for only one-half of the debt. Baugh & Sons Co. *v.* Black, 12.

Fraudulent Conveyances.—The circumstances that counsel for one of the deed of trust creditors was also counsel for the debtor is no evidence of fraudulent collusion between the debtor and the deed of trust creditors, especially in the absence of any charge of fraud in the pleadings. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Insanity.—Where it is shown that the grantor was generally insane during a certain period, and a lucid interval is claimed at a particular time during that period, the burden of proof is on the party alleging such lucid interval to show sanity at that particular time. Inge *v.* Inge, 329.

Laches.—Where a remainderman gives a deed of trust enforceable upon the death of the life tenant no presumption arises against the validity of the deed of trust from a failure of the creditors to assert their debts before the death of the life tenant. Murphy's Hotel Co. *v.* Herndon's Admr., 505

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MORTGAGES AND DEEDS OF TRUST—Continued.

Parol Evidence.—A deed of trust to secure a joint bond of father and son, provided that the trustee should sell first the lands conveyed by the father, "and if a sufficient amount is derived to pay the debt and costs, will not make further sale." Held: That while this clause was a circumstance tending to show that the father was the principal debtor, it might be shown from other parts of the deed and by extrinsic evidence that as between themselves, each was a principal as to one-half the debt and a surety as to the other half. Baugh & Sons Co. *v.* Black, 12.

Release of Deed.—See *infra*, "Decree Directing Release of Deed."

Taxation.—The tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute provided therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages. Virginia Blue Ridge Ry. *v.* Kidd, 426.

Trustee.—Where a married woman makes a deed of trust conveying her property in trust for her support, and selects a competent and trustworthy man as trustee, her selection will not be disturbed, although her husband and daughter would prefer a member of the family as trustee who would act without compensation. Inge *v.* Inge, 329.

Trustee's Sale.—See *infra*, "Deficiency in Quantity."

MULTIPLICITY OF SUITS.

Nuisances.—But one action where a nuisance is permanent Magruder *v.* Va.-Car. Chem. Co., 352; Norfolk Co. Water Co. *v.* Etheridge, 379.

MUNICIPAL CORPORATIONS.

Annexation of Territory.—An extension ordinance must be considered as a whole, and is not unreasonable because unplatted or even marsh lands not needed by the city are included. Warwick County *v.* Newport News, 177.

Loss of revenue to a county not criterion by which question of annexation is to be adjudged. Warwick County *v.* Newport News, 177.

The annexation ordinance in the case at bar is to be read as a whole, and in the light of the court's order of annexation and of the statute, and, when so read and interpreted, it is plain that the council of the city is not authorized or empowered to apply the revenues derived from the annexed territory, during the period of the first five years from the date of annexation, to the improvement of other property of the city. Warwick County *v.* Newport News, 177.

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MUNICIPAL CORPORATIONS—Continued.

Annexation of Territory—Continued.

The proposed extension must be considered as an entirety, and the rights and interests as well of those within the city as of those without are to be taken into consideration. Warwick County *v.* Newport News, 177.

Where the date fixed by the trial court for an extension ordinance to go into effect has passed pending an appeal from the order of extension, this court, on affirming the judgment, will fix a new date for the ordinance to go into effect. Warwick County *v.* Newport News, 177.

Assumpsit.—Action by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

Construction of Powers.—The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. Norfolk *v.* Griffin, 524.

Contract for Pavement.—See STREETS AND HIGHWAYS.

Highways.—See STREETS AND HIGHWAYS.

Map.—See PLAT.

Ordinances.—An extension ordinance must be considered as a whole, and is not unreasonable because unplatted or even marsh lands not needed by the city are included. Warwick County *v.* Newport News, 177.

General rules of construction of annexation ordinances. Warwick County *v.* Newport News, 177.

Sidewalks.—See STREETS AND HIGHWAYS.

Streets.—See STREETS AND HIGHWAYS.

Taxation.—Action of assumpsit by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. Norfolk *v.* Griffin, 524.

Under the provisions of its charter the city of Norfolk may tax other subjects than and in addition to those taxed by the State. It may also adopt a different method of laying the tax from that adopted by the State on the same subject—such as an *ad valorem* method instead of by license. But the city has not the power to divide a single taxable privilege, consisting of the right to conduct the business of a contractor, as classified and defined for the purpose of State taxation in

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MUNICIPAL CORPORATIONS—Continued.

Taxation—Continued.

the form of a State license, into several businesses so as to require several separate city licenses, one for each of the elements of right named in the city ordinance, which all accrue to the citizen under one State license. Norfolk *v.* Griffin, 524.

When the legislature embodied in the charter of the city of Norfolk the limitation that its action under the clause of its charter above quoted should be in a manner "in accordance with the constitution and laws of this State and the United States," the charter in effect itself provided that the municipality should not in acting thereunder enact any ordinance of classification for purposes of taxation in conflict with a classification adopted by the laws of the State; for the inevitable result of such a conflict in enactment between the State and the municipality would be a violation of the uniformity in operation of laws sought to be attained by the provisions of the fourteenth amendment to the Constitution of the United States—which purpose, indeed, of attainment of uniformity so far as practicable, also underlies the provision of the State Constitution and laws on the subject of taxation. Norfolk *v.* Griffin, 524.

NATIONAL BANKS. See BANKS AND BANKING.

NEGLIGENCE.

Burden of Proof.—See *infra*, "Presumption and Burden of Proof."

Carriers.—See CARRIERS.

Contributory Negligence.

Appeal and Error.—Where the question of contributory negligence was properly submitted to the jury under well-established principles, a mere doubt as to whether the jury decided the question properly is plainly insufficient to justify a reversal of the judgment. Richmond *v.* McCormack, 552.

Burden of Proof.—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other. General Accident, etc., Corp. *v.* Murray, 115.

Carriers.—See CARRIERS OF PASSENGERS.

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NEGLIGENCE—Continued.

Crossings.

General Rule.—Wherever the negligence of the plaintiff contributes proximately and efficiently to his injury, there can be no recovery. C. & O. R. Co. *v.* Jones, 784.

Husband and Wife.—The wife owned an automibile. Her husband at work in another city from his home borrowed it from her. The husband had had possession of the automobile for about a week when his wife visited him, and while riding in the automobile driven by her husband was injured in a collision with a street car. The wife was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time with a guest. Held: That the negligence, if any, of her husband, could not be imputed to her, and that she was herself guilty of no negligence. Virginia R. & P. Co. *v.* Gorsuch, 655.

Imputable Negligence.—See IMPUTABLE NEGLIGENCE.

New Trial.—See NEW TRIAL.

Question for Jury.—A. C. L. R. Co. *v.* Church, 725.

Whether a plaintiff in an action to recover damages for personal injuries has been guilty of contributory negligence is a question for the jury under proper instructions from the court. Bashford *v.* Rosenbaum Hardware Co., 1.

Street Railroads.—See STREET RAILROADS.

Streets and Highways.—See STREETS AND HIGHWAYS.

Every one has the right to presume that a public highway is in a reasonably safe condition. A traveler on a public street or road, however, is held to the exercise of ordinary care, and what is ordinary care, of course, differs in different situations. Shenandoah Valley, etc., Co. *v.* Murray, 563.

The general rule is that a traveler has a right to assume that a street is in a reasonably safe condition. Richmond *v.* McCormack, 552.

Crossings.—See CROSSINGS.

Evidence.—The general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down, but no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential. The admissibility of such evidence must be left largely to the discretion of the trial court. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Fellow Servants.—See FELLOW SERVANTS.

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NEGLIGENCE—Continued.

Fires.—See FIRES.

Highways.—See STREETS AND HIGHWAYS.

Imputable Negligence.—See IMPUTABLE NEGLIGENCE.

Master and Servant.—See MASTER AND SERVANT.

Presumption and Burden of Proof.—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other. General Accident, etc., Corp. *v.* Murray, 115.

Proximate Cause.—In an action for injuries sustained in a collision between a taxicab and a street car by a passenger in the taxicab, it was held that the evidence was such as to render proper a submission by the trial court to the jury of these three leading questions of fact: (1) Were both defendants guilty of negligence which concurred as proximate causes of the accident? or (2) Was the defendant railway company guilty of negligence which was the sole proximate cause? or (3) Was the taxi company guilty of negligence which was the sole proximate cause? Virginia Railway, etc., Co. *v.* Hill, 397.

Questions of Law and Fact.—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ, as to the negligence charged, the question is not one of law, but one of fact to be determined by the jury under proper instructions from the court. A. C. L. R. Co., *v.* Church, 725.

Signal Board at Crossing.—See CROSSINGS.

Street Railroads.—See STREET RAILROADS.

Streets and Highways.— See STREETS AND HIGHWAYS.

Vice-Principal.—See FELLOW SERVANTS.

NEGOTIABLE INSTRUMENTS. See BILLS, NOTES AND CHECKS.

NEW TRIALS.

Conflicting Evidence.—The verdict of the jury is conclusive upon a question of fact submitted to them upon conflicting evidence. Millboro Lumber Co. *v.* Donald, 150; Bashford *v.* Rosenbaum H. Co., 1.

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NEW TRIALS—Continued.

Conflicting Evidence—Continued.

Verdict for servant in action against master for personal injuries not set aside where evidence is conflicting as to whether the injury was due to accident or fault of master. Danville *v.* Lipford, 280.

Contributory Negligence.—Where the evidence is conflicting as to whether there was or was not contributory negligence. Bashford *v.* Rosenbaum Hardware Co., 1.

Excessive or Inadequate Damages.—A verdict for $1,000 will not be set aside as excessive where plaintiff received a cut in the face near his eye and an injury to his arm, and where he complained of constant pain from the injury to the eye and of trouble in moving and using his arm more than nine months after the accident. Virginia Railway, etc., Co. *v.* Hill, 408.

Plaintiff was confined in bed about five weeks as a result of the accident, and for the first year after the accident was a nervous wreck, some days being able only to work part of the day. Held: That a verdict of $1,000 was not excessive. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Master and Servant.—A verdict for a servant in an action for personal injuries will not be set aside, although there is much in the evidence tending to show that the servant's injury was due to a mere accident, where there is also evidence sufficient to sustain the finding of the jury to the contrary. Danville *v.* Lipford, 280.

Remittitur.—See REMITTITUR.

Verdict Contrary to or against Weight of Evidence.—See *infra*, "Conflicting Evidence."

Every reasonable inference should be made in favor of a verdict fairly rendered, under proper instructions from the court, in an action for personal injuries, and it should not be set aside unless the evidence is plainly insufficient to support it. Bashford *v.* Rosenbaum Hardware Co., 1.

Where the evidence is conflicting, or is such that reasonable men might fairly differ as to whether there was or was not contributory negligence, the verdict will not be disturbed. Bashford *v.* Rosenbaum Hardware Co., 1.

Collision Between Automobile and Bicycle.—Administratrix's decedent was killed, while riding a bicycle, in a collision with an automobile. There was conflict in the testimony as to the speed of the automobile, the precise location of the accident, the conduct of the decedent, and every other material fact in issue. The jury, as judges of the weight of the testi-

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NEW TRIALS—Continued.

Verdict Contrary to or Against Weight of Evidence—Continued

mony, had the right to believe that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper lookout; that the machine was going at an excessive rate of speed; that if the driver had been keeping a proper lookout and controlling the machine, he could have avoided the accident, even after the peril of the decedent was discovered; and that, if he had been keeping a proper lookout and had made a proper turn, there would have been no accident. Under these circumstances, and under the mandatory provisions of the statute, requiring the court to consider such cases as upon a demurrer to the evidence, there was no reversible error in the refusal of the court below to set aside the verdict on the ground that it was contrary to the law and the evidence. Bohannon-King Co. *v.* Vellines, Admx., 428.

NON-RESIDENTS. See TAXATION.

NUISANCES.

Action for Damages.—Where the nuisance is permanent, and will continue indefinitely, there can be but a single action therefor. Magruder *v.* Va.-Car. Chem. Co., 352; Norfolk Co. Water Co. *v.* Etheridge, 379.

Damages.—Flooding lands. Norfolk Co. Water Co. *v.* Etheridge, 379.

Recovery of entire damage, both past and future, where there is a permanent nuisance. Norfolk Co. Water Co. *v.* Etheridge, 379.

Flooding Lands.—See WATERS AND WATERCOURSES.

Laches.—Pollution of stream. Magruder *v.* Va.-Car. Chem. Co., 352.

Limitation of Actions.—Limitation where there is a permanent nuisance. Magruder *v.* Va.-Car. Chem. Co., 352; Norfolk Co. Water Co. *v.* Etheridge, 379.

Multiplicity of Suits.—But one action where a nuisance is permanent. Magruder *v.* Va.-Car. Chem. Co., 352; Norfolk Co. Water Co. *v.* Etheridge, 379.

Obstruction of Streets and Highways.— See STREETS AND HIGHWAYS.

Streets and Highways.—See STREETS AND HIGHWAYS.

OBLIGATION OF CONTRACTS. See CONSTITUTIONAL LAW.

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OBSTRUCTIONS. See STREETS AND HIGHWAYS; WATERS AND WATERCOURSES.

OCCUPATION TAXES. See LICENSES.

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Estoppel of Director.—Under a pooling agreement made at the time of a sale of part of the interest of appellant to appellees, it was agreed that the president's salary should be arranged at a stockholder's meeting. Held: That notwithstanding this agreement, appellees could not object to the salary fixed at a directors' meeting, where one of them who also represented the other took part in the action. Cary *v.* Holt's Ex'ors, 261.

OPINION EVIDENCE. See EXPERT AND OPINION EVIDENCE.

ORDER OF PROOF.

Appeal and Error.—Reopening the case is within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. Virginia R. & P. Co. *v.* Gorsuch, 655.

Reopening Case.—In an action for personal injuries occasioned by a collision between a street car and an automobile, defendant street railway company, after the evidence had been concluded and plaintiff had rested and concluded her case, demurred to the evidence, because no proof had been offered as to the ownership of the street car which collided with the automobile. The trial court allowed plaintiff to reopen the evidence and prove the ownership of the street car. In this there was no error. Virginia R. & P. Co. *v.* Gorsuch, 655.

ORDINANCES.

An extension ordinance must be considered as a whole, and is not unreasonable because unplatted or even marsh lands not needed by the city are included. Warwick County *v.* Newport News, 177.

General rules of construction of annexation ordinances. Warwick County *v.* Newport News, 177.

PAROL EVIDENCE.

F. O. B.—Lawson *v.* Hobbs, 690.

Mortgages and Deeds of Trust.—A deed of trust to secure a joint bond of father and son provided that the trustee should sell first the lands conveyed by the father "and if a sufficient amount is derived to pay the debt and costs, will not make further sale." Held: That while this clause was a circumstance tending to show that the father was the principal debtor, it might be shown from other parts of the deed and

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PAROL EVIDENCE—Continued.

Mortgages and Deeds of Trust—Continued.

by extrinsic evidence that as between themselves, each was a principal as to one-half the debt and a surety as to the other half. Baugh & Sons Co. *v.* Black, 12.

Sales.—A contract of sale provided that the subject of the sale, a steam engine, should be delivered f. o. b. Suffolk. It was the duty of the court to construe the written contract. Parol evidence was inadmissible to show that the contract required the delivery of the engine in Norfolk. Lawson *v.* Hobbs, 690.

Where a contract of sale is f. o. b. a certain point, evidence is admissible to show that it was understood between the parties that certain more specific directions were to be given. As for example, where the contract of sale only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon that point, to permit parol evidence to the effect that the subject of the sale was to be shipped by a certain carrier, destined for the plant of the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. But the case at bar did not depend upon this question, because the purchaser repudiated the contract before the engine reached Norfolk, and there was no contradiction of the vendor's statement to the effect that the carrier would have delivered it free of charge at purchaser's plant. Lawson *v.* Hobbs, 690.

Suretyship.—A deed of trust to secure a joint bond of father and son provided that the trustee should sell first the lands conveyed by the father "and if a sufficient amount is derived to pay the debt and costs, will not make further sale." Held: That while this clause was a circumstance tending to show that the father was the principal debtor, it might be shown from other parts of the deed and by extrinsic evidence that as between themselves, each was a principal as to one-half the debt and a surety as to the other half. Baugh & Sons Co. *v.* Black, 12.

Warranty.—Testimony which does not seek to vary or contradict a written guaranty, but which accords with it, showing the attending circumstances, the construction placed upon it by the parties and their subsequent conduct with reference thereto is admissible. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Wills.—Parol evidence to determine the subject of devise where there is a latent ambiguity. Ewell *v.* Brock, 475.

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PARTITION.

Amendments.—The irregularity of allowing a partition bill to be amended after the evidence was concluded and the commissioner's report filed, is entirely cured by a consent order of the court, by which it was agreed that the testimony taken before the commissioner, and the report of the commissioner, should be considered and treated with the same effect on the amended as upon the original bill. Cottrell *v.* Mathews, 847.

Guardian Ad Litem.—Sections 2618 and 2619, Code of 1904, are inapplicable to partition suits. Cottrell *v.* Mathews, 847.

PARTNERSHIP.

Accounting and Settlement.

Jurisdiction of Equity. Clay's Adm'r *v.* Kelly, 437.

K., a retiring partner, had been of service to his partners in securing a government contract and giving the necessary bond. He remained bound under both so far as the government and the surety company were concerned. These facts constituted abundant consideration for the $500 which the partnership paid him upon a final settlement and termination of their relations with him as an associate under the original contract. Clay's Admr *v.* Kelly, 437.

Shortly after the final assignment of the government contract, and in pursuance of the contract with the assignees, a receiver was procured for the partnership, and thereby certain technical difficulties were obviated, and the transfer of the government contract was perfected. Held: That although the complainant was not a party to that suit, the record might be introduced by him to show the facts appearing therein as to the transfer of the contract, the disposition of the assets of the firm, and the payment therefor. The matters shown in that record were not within the rule of evidence as to *res inter alios acta.* They were independent material facts, proved by the record, charged in the complainant's bill, and proper as evidence to suport his case. Clay's Adm'r. *v.* Kelly, 437.

Construction of Contract of Partnership.—Clay's Adm'r *v.* Kelly, 437.

Contract of Partnership.—The contract of the partnership to pay K., a former member of the partnership, who had retired from it, a share of the profits upon his signing a contract of assignment by the partnership of a government contract, rested upon sufficient consideration. His signature resulted in both a benefit to the appellants and a risk to himself. Clay's Adm'r *v.* Kelly, 437.

Duress.—Where a partner who had retired from the partnership at the solicitation of his late partners signed a contract of

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PARTNERSHIP—Continued.

Duress—Continued.

assignment of a government contract which had been obtained by the partnership, being under no obligation to sign the contract of assignment, and preferring not to do so at all, even for a consideration, there was no foundation upon which to rest any claim of duress in the procurement of the new agreement by which he was to receive a share of the profits. Clay's Adm'r *v.* Kelly, 437.

Duty to Observe Good Faith in Purchase of Partner's Interest.—A partner, more intimately acquainted with the business of the partnership than his other partners, is required, when he seeks to purchase their interests, to act openly and in good faith. But the burden of proof does not rest on such purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud. Shepherd *v.* Darling, 586.

The managing partner in a concern sought to buy the interest of a deceased partner from his executor. The executor not relying upon the representations of the managing partner invoked the aid and advice of a court of equity. The court upon the report of a commissioner appointed to investigate the proposition to the effect that the price offered was a good price and advantageous to the beneficiary, confirmed the report and directed the sale. Held: That under these circumstances the burden of proof to show fraud and undue influence would be upon the parties attacking the sale. Shepherd *v.* Darling, 586.

Equity.—Complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleged profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction. Clay's Adm'r *v.* Kelly, 437.

Presumptions and Burden of Proof.—Burden of proof not on purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud. Shepherd *v.* Darling, 586.

Profits.—A partner who had retired from a partnership, upon his signing a contract with another firm, M. & J., was o

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PARTNERSHIP—Continued.

Profits—Continued.

receive one-tenth of the profits that might be realized by the partnership in the matter of the contract with M. & J. M. & J. were unable to fulfill their contract with the partnership and assigned their contract and plant to the partnership, who thereupon assigned the plant and contract to a third firm. Held: That the profits realized by the firm through this last assignment must be regarded as profits realized by the firm in the matter of the contract with M. & J. Clay's Adm'r *v.* Kelly, 437.

PASSENGERS. See CARRIERS; STREET RAILROADS.

PATENTS AND TRADE-MARKS.

Trade Secrets.—See TRADE SECRETS.

PAUPERS.

Forma Pauperis.—Section 3538, Code of 1904, provides that, "a poor person may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party." Held: That this section does not apply to appellate proceedings. Tyle *v.* Garrison, 697.

PAYMENT.

Application of Payment.—General rule as to application of payments. Baker *v.* Lynchburg Nat. Bank, 208.

Discount.—The reserving of a discount by a bank is not a payment by the debtor of interest on the loan. Baker *v.* Lynchburg Nat. Bank, 208.

Voluntary Payment.—In the absence of constitutional limitation upon its powers, the right of the legislature to refund taxes paid, even though voluntarily paid, is unquestioned. Although the legislature may not be compellable to refund an amount so paid, it may do so without compulsion. Such acts are not infrequent; and it is settled law that a valid appropriation may be made to discharge a merely moral obligation. Commonwealth *v.* Ferries Co., 827.

The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment. The rule, of course, does not apply where repayment is made pursuant to a valid statute. Commonwealth *v.* Ferries Co., 827.

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PENALTIES. See USURY.

Telegraph Companies.—Whether the statutory penalty may be enforced in clear cases of negligence occurring within the State where the message is interstate commerce. Western Union Tel. Co. *v.* Bolling, 413.

PERSONAL INJURIES. See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILROADS; STREETS AND HIGHWAYS.

Damages.—See DAMAGES.

Excessive or Inadequate Damages.—See NEW TRIALS.

PETITION. See APPEAL AND ERROR.

PLAT.

Establishment of alley. Daniel *v.* Doughty, 853.

Survey and map required by Code 1904, section 1014. Virginia Beach *v.* Ogle, 611.

PLEADING.

Amendments.—See AMENDMENTS.

Appeal and Error.—A petition for a writ of error is a pleading Ewell *v.* Brock, 475.

Bill in Equity.—See EQUITY.

Conclusions of Law.—See LEGAL CONCLUSIONS.

Cure by Verdict.—See AMENDMENTS.

Declaration.—*Account* filed with declaration no part of declaration. Norfolk *v.* Norfolk County, 356.

Aggravation of Previous Disease.—Where a wrong is committed, whatever the physical condition of the injured party, whether he be strong or weak, healthy or sickly, the harm done by such wrong, including the aggravation of existing ailments, if any, is the natural consequence of the defendant's act, and need not be specially averred. Virginia R. & P. Co. *v.* Hubbard, 664.

Amendments.—See AMENDMENTS.

Counts.—The count in a declaration is treated as partaking of the nature of the action. So that if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for a declaration to contain allegations sufficient to support it, either in tort or in assumpsit. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

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PLEADING—Continued.

Declaration—Continued.

Master and Servant.—Sufficiency of declaration in action of servant against master for negligence. Millboro Lumber Co. *v.* Donald, 150.

Demurrers.—See DEMURRERS.

Equity.—See EQUITY.

General Issue.—Where defendant pleads the general issue and goes to trial upon the merits he thereby waives technical defects in the declaration. Richmond *v.* McCormack, 552.

Whether failure of consideration may be taken advantage of under the general issue. Brenard Mfg. Co. *v.* Brown, 757.

Legal Conclusions.—See LEGAL CONCLUSIONS.

Ultimate Facts.—Klaff *v.* Virginia R., etc., Co., 347.

Waiver of Defects.—After the plaintiff had rested and the defendant had introduced one witness, the court allowed the plaintiff to amend the declaration by setting out the precise dates upon which various contracts and sales had been made and the point was raised that the declaration as amended misjoined causes of action. The action was trespass on the case in tort and it was claimed that the third count in the declaration was in contract. Even if the point had merit, inasmuch as defendant had failed to specify this ground in its original demurrer, and had pleaded not guilty, it had been waived. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Where defendant pleads the general issue and goes to trial upon the merits, he thereby waives technical defects in the declaration. Richmond *v.* McCormack, 552.

PLEDGE AND COLLATERAL SECURITY.

Bills, Notes and Checks.—See BILLS, NOTES AND CHECKS.

POOR PERSONS. See PAUPERS.

POWER OF ATTORNEY.

Warrant of Attorney to Confess Judgment.—See CONFESSION OF JUDGMENTS.

PREFERRED STOCK. See STOCK AND STOCKHOLDERS.

PRESUMPTIONS AND BURDEN OF PROOF.

Abandonment of Easement.—The law is perfectly well settled that the burden of proof to show an abandonment of an easement is upon the party claiming such abandonment, and that he must establish the fact by clear and unequivocal evidence. Daniel *v.* Doughty, 853.

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PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Accident Insurance.—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other. General Accident, etc., Corp. *v.* Murray, 115.

In order to recover on an accident policy, the burden is on the plaintiff to bring himself within the provisions of the contract of insurance by proving an accidental injury to the assured. There is no presumption to aid in this proof, as death is presumed to be the result of natural dissolution rather than of accidental injury. In the case at bar, the accidental death of the assured is not established by the evidence introduced in the cause. General Accident, etc., Corp. *v.* Murray, 115.

Bills, Notes and Checks.—Where the defense to an action on a negotiable instrument is a release by an extension of time to principal, the burden of proving the existence of the agreement rests upon the defendant. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Bridges.—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old bridge with its approaches as a location for the new bridge. Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it. Richmond *v.* Mayo Land & Bridge Co., 545.

Burglary.—*Presumption from Possession of Stolen Goods.*—The burden rests upon the Commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession. Tyler's Case, 868.

The posession of stolen goods contemplated by the rule above referred to is an exclusive possession on the part of the accused; otherwise such rule is not applicable. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. Tyler's Case, 868.

The possession of stolen goods is, of itself, not even *prima facie* evidence of housebreaking or of burglary. Tyler's Case, 868.

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PRESUMPTIONS AND BURDEN OF PROOF—Cintinued.

Burglary—Continued.

Presumption, etc.—Continued.

Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of larceny, but extrinsic mechanical indications may constitute such additional evidence. Tyler's Case, 868.

Death.—Death is presumed to be the result of natural dissolution rather than of accidental injury. General Accident, etc., Corp. *v.* Murray, 115.

Eminent Domain.—A city being about to erect a new and modern bridge across a river, instituted proceedings to condemn an old bridge with its approaches as a location for the new bridge. Held: That the burden of proof rested upon the owner of the bridge to show that the title to the approaches was in it. Richmond *v.* Mayo Land & Bridge Co., 545.

Fraudulent and Voluntary Conveyances.—The circumstance that counsel for one of the deed of trust creditors was also counsel for the debtor is no evidence of fraudulent collusion between the debtor and the deed of trust creditors, especially in the absence of any charge of fraud in the pleadings. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Insanity.—Burden of proof to show lucid interval. Inge *v.* Inge, 329.

Instructions.—In an action for personal injuries against a railroad company, the court, through inadvertence, failed to read an instruction to the jury, referring to the burden of proof, which the court at the request of the defendant intended to read. The court certified, however, that the case was argued before the jury by the opposing attorneys upon proper assumptions as to the burden of proof as stated in the instruction. Held: That while such an inadvertence might and would probably be reversible error as to many instructions, and in most cases, yet as it is inconceivable that the competent attorneys who argued this case left the jury in any doubt whatever as to the burden of proof, there is no reason to sup-

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PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Instructions—Continued.

pose that the railroad company was injured by the inadvertence of the judge. A. C. L. R. Co. *v.* Church, 725.

Master and Servant.—See MASTER AND SERVANT.

Negligence.—In an action to recover damages for a negligent injury, the burden of showing negligence by a preponderance of the evidence is upon the plaintiff, and if the injury might have resulted from one of two causes for only one of which the defendant was responsible there can be no recovery; neither can the plaintiff recover if it is just as probable that the damage was caused by the one as by the other. General Accident, etc., Corp. *v.* Murray, 115.

Non-Production of Evidence.—When a defendant who can, by his own testimony, throw light upon matters at issue necessary to his defense and peculiarly within his own knowledge if the facts exist, fails to go upon the witness stand, the presumption is raised and will be given effect to, that the facts do not exist. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Where the debtor and grantor in a deed of trust testified as to the circumstances under which the deed and the notes which it evidenced were given, no presumption arises from the failure of the beneficiaries in the deed to testify, where it does not appear that the facts in regard to the execution and the delivery of the notes in question were peculiarly within their knowledge, there being no allegation in the pleadings of any collusion between the debtor and the beneficiaries. Although the beneficiaries had knowledge of the consideration furnished by them, this was not peculiarly within their knowledge. It was equally within the knowledge of their debtor, who admitted the validity of the consideration. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Partnership.—Burden of proof not on purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud. Shepherd *v.* Darling, 586.

Presumption of Knowledge of Law.— *Taxation.*—In a sense, and as a general rule, it is true that every man is presumed to know the law, and that ignorance of it furnishes no excuse; but when the legislature provided for the remission of interest on taxes omitted from assessment through "no fault" of the taxpayer, it must have meant to recognize a difference between omissions due to wilful and conscious wrongdoing and cases due to honest misapprehension and misconstruction of the tax laws. Com. *v.* United Cigarette M. Co., 835.

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PRESUMPTIONS AND BURDEN OF PROOF—Continued.

Reformation of Instruments.—Burden of proof of showing laches, acquiescence or ratification upon defendant. Inge *v.* Inge, 329.

Streets and Highways.—Every one has the right to presume that a public highway is in a reasonably safe condition. A traveler on a public street or road, however, is held to the exercise of ordinary care, and what is ordinary care of course, differs in different situations. Shenandoah Valley, etc., Co. *v.* Murray, 563.

The general rule is that a traveler has a right to assume that a street is in a reasonably safe condition. Richmond *v.* McCormack, 552.

Testimony Peculiarly Within Knowledge of Party to Suit.— See *infra*, "Non-Production of Evidence."

PRINCIPAL AND AGENT.

General Agent.—See INSURANCE.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRIVATE LAWS. See STATUTES.

PRIVATE WAYS.

Change in Location.—Changes in the location of a private road made by the owner of the servient estate and acquiesced in by the parties entitled to the use of the road, are equivalent to changes of the route by agreement, and do not in any way prejudice the rights of the latter. Hammond *v.* Ryman, 131.

Demurrer.—Where a bill sets up a right of way as appurtenant to complainant's land and as a way of necessity, and also by virtue of a writing executed by the defendant, and the allegations of the bill are sufficient to support the claim to the way both as appurtenant and as a way of necessity, a demurrer on the ground of the insufficiency of the writing was properly overruled. Hammond *v.* Ryman, 131.

Extinguishment.—See *infra*, "Change of Location."

Ways Appurtenant or in Gross.—Where an owner sells a part of a tract of land to another, and at the time of the sale there is a private road leading from the land sold through the lands retained to a public road, and such private road is apparent, continuous and reasonably essential to the use of the purchaser at the time of his purchase and has been so ever since, covering a period of twenty-five years, such purchaser and those claiming under him are entitled to the use of such road as appurtenant to their purchase. Hammond *v.* Ryman, 131.

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PRIVILEGED COMMUNICATIONS. See ATTORNEY AND CLIENT.

PRIVITY.

Assumpsit. Norfolk *v.* Norfolk County, 356.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROBATE AND ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS.

PROMOTERS. See CORPORATIONS.

PROPERTY.

Where one originated an idea or scheme of banking, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind. Stein *v.* Morris, 390.

PURCHASER. See SALES; VENDOR AND PURCHASER.

QUESTIONS OF LAW AND FACT.

Bills, Notes and Checks.—Existence of an agreement to extend time to principal. Cape Charles Bk. *v.* Farmers Mut. Ex., 771.

Particular facts held to constitute a reasonable time. Brown *v.* Thomas, 763.

Contributory Negligence.—See CONTRIBUTORY NEGLIGENCE.

Crossings.—If the rails were so covered with earth as not only to be invisible on the highway bed, but to convey the impression that the track was not in use by trains; if, in addition to this, the rails themselves were rusty, obscured by vegetation growing close to them; and if there was no crossing signal board, as required by Code of 1904, section 1249-d, subsection 49; then these combined circumstances presented a question to be submitted to the jury to determine whether or not a prudent man exercising due care commensurate with the danger to be apprehended, in approaching such a track, would apprehend danger, or would feel assured of his safety because of the absence of the crossing sign, together with such other surrounding conditions. A. C. L. R. Co. *v.* Church, 725.

Demurrer to the Evidence.—See Demurrer to the Evidence

Interpretation and Construction.—Duty of court to construe written instruments. Lawson *v.* Hobbs, 690.

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QUESTIONS OF LAW AND FACT—Continued.

Interpretation and Construction—Continued.

It is the duty of the court to construe written instruments, when the writing is complete in itself and the subject matter of it is certain or the facts are ascertained. Ewell *v.* Brock, 475.

Master and Servant.—In an action of assumpsit by a servant against his master to recover on account of his salary for the balance of the year upon a wrongful discharge, where the evidence tended to show that the master had secretly determined to drop the servant, and in effect had done so, the question whether he was discharged or quit of his own accord, is one for the jury to answer. Conrad *v.* Ellison-Harvey Co., 458.

Plaintiff was originally hired for a fixed term of one year. He held over for several succeeding years without any new agreement. The only change ever made was one increase of salary. Held: That the question of whether he was employed at the time of his discharge by the month or by the year was for the jury. Conrad *v.* Ellison-Harvey Co., 458.

Negligence.—Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw one inference therefrom. If fair-minded men, from the proofs submitted, may honestly differ, as to the negligence charged, the question is not one of law, but one of fact to be determined by the jury under proper instructions from the court. A. C. L. R. Co. *v.* Church, 725.

Reasonable Time.—Brown *v.* Thomas, 763.

Streets and Highways.—See STREETS AND HIGHWAYS.

Wills.—Interpretation and construction of will. Ewell *v.* Brock, 475.

RAILROADS.

Crossings.—See CROSSINGS.

Eminent Domain.—See EMINENT DOMAIN.

Fires.—See FIRES.

Grade Crossings.—Se CROSSINGS.

Master and Servant.—See MASTER AND SERVANT.

Release of Damages.—See RELEASE.

Riparian Rights.—See WATERS AND WATERCOURSES.

Servant.—See MASTER AND SERVANT.

Signal Board.—See CROSSINGS.

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RAILROADS—Continued.

Signals.—*Disregarding Signals.*—Plaintiff's intestate, a signalman, after he had set a stop signal against a train, was struck and killed by such train, which disregarded the signal while he was tending another light. The stop signal was plainly visible to the engineer of the train. Held: That defendant railroad was guilty of negligence. A. C. L. R. Co. *v.* Tredway's Admx., 735.

Waters and Watercourses.—See WATERS AND WATERCOURSES.

REAL PROPERTY. See LANDLORD AND TENANT.

Boundaries.—See BOUNDARIES.

REASONABLE TIME.

Bills, Notes and Checks.—Blanks must be filled within a reasonable time. Brown *v.* Thomas, 763.

Code of 1904, section 2841-a, sub-section 53, provides that "when an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course." What is a reasonable time for any purpose depends always upon the facts of the particular case. In the case at bar, a note dated August 24, 1911, payable on demand, was not discounted until October 31, 1911. The note was given in anticipation of its use to raise money for the purpose of handling the season's crops, when and as such use might be necessary. Held: That there was no unreasonable delay in negotiating the note. Colona *v.* Parksley Nat. Bank, 812.

Carriers.—What constitutes notice to a carrier of a claim for damages for failure to deliver stock within a reasonable time. Ches. & O. R. Co. *v.* Rebman, 71.

RECORDS. See APPEAL AND ERROR.

Judicial Record.—Although counsel for the defendant suggested in his brief and in the oral argument that the record before the court was inadequately and imperfectly made up and was not just to the defendant, it is obvious that the court must dispose of the case on the record as it came before it. Brenard Mfg. Co. *v.* Brown, 757.

REFORMATION OF INSTRUMENTS. See RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

REINSURANCE. See INSURANCE.

RELEASE.

Decree Directing Release of Deed of Trust.—See MORTGAGES AND DEEDS OF TRUST.

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RELEASE—Continued.

Eminent Domain.—A vendor to a railroad company released any claim to damages to the remainder of the tract of land by the construction of a railroad or railroad works on the land conveyed such as could be recovered in condemnation proceedings. Held: That the release covered damages caused by the change of a grade crossing to an overhead crossing. Forest V. L. Co. *v.* Atlantic, etc., R. Co., 308.

REMAINDERS.

Boundaries.—Whether remainderman must be made a party to proceedings to determine boundaries. Collier *v.* Hiden, 453.

Wills.—*Vested and Contingent Remainders.*—A will should be construed to favor vested rather than contingent remainders Cottrell *v.* Mathews, 847.

REMITTITUR.

Where the lower court erred in peremptorily directing the jury to allow interest to plaintiff from the time the plaintiff's demand accrued, where under section 3390 of the Code such allowance of interest was discretionary with the jury, the appellate court may affirm the judgment on condition that plaintiff relinquish the interest upon the principal sum found by the jury. Wash. & O. D. Ry. *v.* Westinghouse Co., 620.

REPORT. See MASTER IN CHANCERY.

RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS.

Burden of Proof.—Burden of proof of showing laches, acquiescence or ratification upon defendant. Inge *v.* Inge, 329.

Compromise.—Compromise agreements are favored and where their rescission is sought on the ground of fraud or duress such fraud or duress must be clearly and convincingly shown. Cary *v.* Harris, 252.

Estoppel.—Although defendant had given a deed of trust on the tract of land in question after complainant had declined an offer of reconveyance, it was held that complainant was not estopped, where it appeared that defendant was secured collaterally, and was besides able to pay off the debt. Inge *v.* Inge, 329.

Evidence.—The rule that fraud must be established by clear and convincing testimony is particularly true in cases involving rescission. Cary *v.* Harris, 252.

Evidence of mistake must be clear and convincing. Holland *v.* Vaughan, 324.

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RESCISSION, CANCELLATION AND REFORMATION OF INSTRUMENTS—Continued.

Evidence—Continued.

Where the evidence is clear and convincing that a tract of land under a partition agreement was conveyed to a daughter instead of her mother, the deed must be reformed notwithstanding the natural presumption that in such a partition the widow would get no land in fee simple. Inge *v.* Inge, 329.

Fraud.—The rule that fraud must be established by clear and convincing testimony is particularly true in cases involving rescission. Cary *v.* Harris, 252.

Jurisdiction of Equity.—Mistake may be shown by parol, but evidence must be clear and convincing. Holland *v.* Vaughan, 324.

The jurisdiction of a court of equity to reform written instruments is well settled. Holland *v.* Vaughan, 324.

While parol evidence will not be received to vary, alter or contradict the terms of a valid written instrument, still if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake so as to make the instrument conform to the real agreement of the parties. Holland *v.* Vaughan, 324.

Laches.—Burden of proof of showing laches, acquiescence or ratification upon defendant. Inge *v.* Inge, 329.

Scarcely a year elapsed after complainant learned of the mistake until she became ill and mentally incompetent to protect her interests, and remained so practically all the time until shortly before this suit was brought. Held: To preclude the doctrine of laches. Inge *v.* Inge, 329.

RESIDENTS.

Non-residents.—See TAXATION.

RETROSPECTIVE LAWS. See CONSTITUTIONAL LAW; STATUTES.

RIGHT OF WAY. See PRIVATE WAYS.

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES.

ROADS. See PRIVATE WAYS; STREETS AND HIGHWAYS.

SALES.

Advertising Scheme.—See *infra*, "Failure of Consideration."

The sale of a scheme of advertising is an ample consideration for the notes given in payment thereof. Although the scheme contemplated giving away the articles of merchandise as premiums or prizes, yet these articles and the services fur-

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SALES—Continued.

Advertising Scheme—Continued.

nished by the plaintiff in connection with the advertising scheme, represented property and value. Brenard Mfg. Co. *v.* Brown, 757.

Where there was no provision in the contract against sales to competitors of the defendant, the fact that plaintiff had sold the same scheme to a competitor of defendant was no defense against his action, although the buyer testified that he understood from the seller's salesman that no similar scheme would be placed with any other merchant near him. Brenard Mfg. Co. *v.* Brown, 757.

Cross-Examination of Witness.—A buyer testified that owing to delay in delivery he had been obliged to buy another engine in place of the one contracted for with the seller. Upon cross-examination he was asked what price he paid for this engine. This question was proper, both to show the entire transaction, part of which had been introduced in the interest of the buyer, as well as to show the motive which might have possibly influenced the buyer in repudiating his contract. Lawson *v.* Hobbs, 690.

Delivery.—Where a contract of sale required the engine to be shipped "at once," and there was no delay which the utmost diligence of the seller could have avoided, the contract was sufficiently complied with. In this case shipment was made within two days, as soon as the railroad furnished a car. Lawson *v.* Hobbs, 690.

Failure of Consideration.—Defendant purchased from plaintiff under a written contract a copyrighted advertising plan and certain goods and supplies to be used in connection therewith, giving his notes in payment therefor. Plaintiff gave his bond to secure a refund to defendant, if defendant's sales were not increased in the following year to a certain fixed sum. But this agreement for a refund in case defendant's sales were not increased to the named sum were based on a representation of defendant as to sales of the past year, which was admittedly false. Held: That in an action on the notes there was no merit in the defense and that defendant's sales did not reach the sum named in the contract. Brenard Mfg. Co. *v.* Brown, 757.

It was urged by defendant that, independent of the special written contract, there was a general agreement and undertaking by the plaintiff to increase the defendant's sales for the year following the purchase of the advertising plan, and that, as no increase in fact resulted, there was a total failure

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SALES—Continued.

Failure of Consideration—Continued.

of consideration. Held: That this defense, if sound, could be availed of under the general issue; but that to adopt this contention would be to make a new contract for the parties. There was no evidence of any agreement to increase the defendant's sales, except as set forth above: and the defendant could not prevent the collection of his notes by setting up the plaintiff's failure to comply with a stipulation which was induced by his own misrepresentation of a material fact. Brenard Mfg. Co. *v.* Brown, 757.

Whether the failure of consideration may be taken advantage of under the general issue. Brenard Mfg. Co. *v.* Brown, 757.

F. O. B.—Where a contract of sale is f. o. b. a certain point, evidence is admissible to show that it was understood between the parties that certain more specific directions were to be given. As for example, where the contract of sale only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon that point, to permit parol evidence to the effect that the subject of the sale was to be shipped by a certain carrier, destined for the plant of the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. But the case at bar did not depend upon this question, because the purchaser repudiated the contract before the engine reached Norfolk, and there was no contradiction of the vendor's statement to the effect that the carrier would have delivered it free of charge at purchaser's plant. Lawson *v.* Hobbs, 690.

Where qualifying words are used in connection with the words "free on board" or "f. o. b," then the contract may be construed to have a different meaning, but where referring to shipments by rail, the words "free on board," or the letters "f. o. b." a certain place, are used, without any other words in the contract indicating a qualification of their meaning, they mean that the subject of sale is to be placed on board cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass to the buyer,.and the property be wholly at his risk, and such words are not open to construction. Lawson *v.* Hobbs, 690.

Implied Warranty.—See WARRANTY.

Parol Evidence.—A contract of sale provided that the subject of the sale, a steam engine, should be delivered f. o. b. Suffolk. It was the duty of the court to construe the written contract.

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SALES—Continued.

Parol Evidence—Continued.

Parol evidence was inadmissible to show that the contract required the delivery of the engine in Norfolk. Lawson *v.* Hobbs, 690.

Where a contract of sale is f. o. b. a certain point, evidence is admissible to show that it was understood between the parties that certain more specific directions were to be given. As for example, where the contract of sale only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon that point, to permit parol evidence to the effect that the subject of the sale was to be shipped by a certain carrier, destined for the plant of the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. But the case at bar did not depend upon this question, because the purchaser repudiated the contract before the engine reached Norfolk, and there was no contradiction of the vendor's statement to the effect that the carrier would have delivered it free of charge at purchaser's plant. Lawson *v.* Hobbs, 690.

Warranty.—See WARRANTY.

SERVANT. See MASTER AND SERVANT.

SETTLEMENT. See COMPROMISE.

SIDEWALKS. See STREETS AND HIGHWAYS.

SIGNALS. See CROSSINGS; RAILROADS.

SLAVES.

Bastardy.—Neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-existing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children. Francis *v.* Tazewell, 319.

Construction of act of February 27, 1866, Code of 1904, section 2227, validating slave marriages and legitimizing the issue thereof. Francis *v.* Tazewell, 319.

Legitimacy of children. Francis *v.* Tazewell, 319.

Marriage Annulment.—Under the provisions of the act of February 27, 1866, Code of 1904, section 2227, where a man and woman, both slaves, agreed to occupy the relation to each other of husband and wife and in pursuance of that agree-

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SLAVES—Continued.

Marriage Annulment—Continued.

ment cohabited together prior to February 27, 1866, the subsequent abandonment, after the passage of the act, of the woman by the man for unfaithfulness could neither dissolve the marriage nor affect the legitimacy of the children of the marriage. Francis *v.* Tazewell, 319.

The act of February 27, 1866, does not apply to cases where the cohabitation is a purely meretricious connection. Francis *v.* Tazewell, 319.

SPECIAL DEMURRERS. See DEMURRERS.

SPECIAL LAWS. See STATUTES.

STATE.

Appropriation Acts.—Section 186 of the Constitution provides that, "No money shall be paid out of the treasury except in pursuance of appropriations made by law." Under this provision no particular form of appropriation is prescribed, and an act which directs the Auditor of Public Accounts to draw his warrant for a definite sum in favor of the claimant on the treasurer of a city, complies with all the requirements of a valid appropriation. Commonwealth *v.* Ferries Co., 827.

The legislature, in the matter of making appropriations, acts in its administrative rather than in its legislative capacity. Commonwealth *v.* Ferries Co., 827.

The use of technical words in a statute making an appropriation is not necessary. Commonwealth *v.* Ferries Co., 827.

Jurisdiction.—A State can only be sued by a citizen upon such terms as it is pleased to prescribe, and the Circuit Court of the city of Richmond alone has been given jurisdiction of suits for injunctions involving State taxes. Commonwealth *v.* Ferries Co., 827.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF JEOFAILS. See AMENDMENTS.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Amendments.—*Liberal Construction of Statute.*—Code of 1904, section 3384, and act of March 27, 1914 (Acts 1914, ch. 331, p. 641), are remedial and must be liberally construed to advance the remedy and avoid the evils which they seek to cure. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

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STATUTES—Continued.

Appropriation Acts.—See STATE.

Constitutionality.—See CONSTITUTIONAL LAW.

The legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication. We look to the Constitution of the State, not for grants of power, but for limitations. When the prohibition is not found in the language of that instrument, or in its frame-work and general arrangement, there is no solid ground to pronounce the enactment void. The infractions must be clear and palpable. Com. *v.* United Cigarette M. Co., 835.

Construction.—*Repeal by Implication.*—See *infra*, "Repeal by Implication."

The constitutionality of a statute cannot be made to depend upon the construction put upon it by the court. If an act be constitutional upon its face, it cannot be made unconstitutional by an erroneous interpretation or an improper application of it by the court. C. & O. R. Co. *v.* May, 790.

Usury statutes. Baker *v.* Lynchburg Nat. Bank, 208.

Preamble.—The preamble to a statute is no part of it and cannot enlarge or confer powers or control the words of the act unless they are doubtful or ambiguous. Not being an essential part of the statute, it may be altogether omitted. Commonwealth *v.* Ferries Co., 827.

Private Laws.—See *infra*, "Special or Private Laws."

Repeal by Implication.—The act of March 18, 1915, commonly known as the "bank act" (Acts 1915, p. 209), relating to taxes on the shares of bank stock, does not in terms refer to section 1040-a of the Code (1904) and there is nothing in the title or body of the act even to suggest a legislative purpose, either by amendment or substitution, to repeal said section. Tresnon *v.* Supervisors, 203.

The repeal of statutes by implication is not favored by the courts, and if two acts dealing with the same subject can be harmonized, it is the duty of the court to give effect to both. Tresnon *v.* Supervisors, 203.

Retrospective Laws.—There are no constitutional inhibitions against the passage of retrospective laws as such. They are not favored by the courts, but to be invalid they must impair the obligation of contracts, destroy vested rights or fall within the definition of ex post facto laws. Com. *v.* United Cigarette M. Co., 835.

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STATUTES—Continued.

Retrospective Laws—Continued.

Statutes will not be given a retrospective effect except in cases where such effect was plainly intended by the legislature. This rule applies peculiarly to the laws relating to assessment of property which has been omitted from taxation, the rule being that such assessments are to be made according to the law in force at the time the assessment should have been made. Consequently, where a statute forbade the charge of interest on taxes omitted through no fault of the taxpayer, was subsequently amended allowing the addition of interest in all cases of omitted taxes, the amendment should not be construed to apply retrospectively. Com. *v.* United Cigarette M. Co., 835.

Special or Private Laws.—Nor does the Constitution require that the illegality of the tax shall be judicially determined before the legislature may act. Commonwealth *v.* Ferries Co., 827.

Section 63, clause 9, of the Constitution of Virginia prohibits the legislature from refunding by private act money lawfully paid into the treasury. But the Constitution imposes no limitation upon the power of the legislature to refund money unlawfully paid or collected. The fact that the Constitution in terms prohibits the one and is silent as to the other, creates a strong presumption that it was not intended to trench upon the absolute control of the legislature in its management of the business of the State with respect to refunding money unlawfully paid into the treasury. Commonwealth *v.* Ferries Co., 827.

Section 64 of the Constitution provides: "* * * no private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual." And sections 567 and 568, Code of 1904, furnish remedies for the correction of erroneous assessment of taxes. Notwithstanding these provisions, the legislature is not deprived of the power of refunding by special act taxes illegally collected. "The claim is of a class that peculiarly falls within the administrative department of the legislature and it would be unwise and inconvenient by a too narrow construction of section 64, to deprive the legislature of its exercise of a power which existed long before the adoption of the present Constitution in which this provision appears for the first time." Commonwealth *v.* Ferries Co., 827.

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STATUTES—Continued.

Special or Private Laws—Continued.

The Constitution of Virginia, section 63, clause 8, forbids special laws remitting or releasing any obligation or liability of any person, corporation or association to the State or to any political sub-division. As no one rests under any obligation or liability to pay taxes on property expressly exempted by the Constitution, this provision has no application to a statute refunding such tax. Nor has section 63, clause 18, of the Constitution, which prohibits granting to any private corporation, association or individual any special, or exclusive right, privilege or immunity, any application to such an act. Commonwealth *v.* Ferries Co., 827.

Taxation.—*Construction of Tax Acts.*—See TAXATION.

STOCK AND STOCKHOLDERS.

Dividends.—See *infra*, "Preferred Stock."

Interest on dividends after liquidation. Drewry-Hughes Co. *v.* Throckmorton, 859.

It is fundamental in the law of corporations that the directors have no authority to declare a dividend upon any of its stock, common or preferred, unless the dividends are earned. Drewry-Hughes Co. *v.* Throckmorton, 859.

Liquidation of Corporation.—A stipulation plainly made between the stockholders, or classes of stockholders, as to how the assets of the corporation shall be distributed among the stockholders in liquidation, after all claims upon the corporation by creditors and others have been satisfied, is permissible and valid and is not forbidden by the principles of our corporation law. Drewry-Hughes Co. *v.* Throckmorton, 859.

No dividends can be either declared or earned after the corporation ceases to do business. Therefore, the "arrears of dividends due and unpaid," for which the preferred stockholder is given a preference as well as for the face value of his stock, means such unpaid dividends as had accumulated up to the time the corporation ceased to do business or went into liquidation. Drewry-Hughes Co. *v.* Throckmorton, 859.

Preferred Stock.—*Dividends.*—After making the provision in the foregoing syllabus, the certificate provides for the preferential rights of the preferred stockholder, in the event the corporation ceases to do business or goes into liquidation, in the following language: "And the preferred stock is likewise to have a prior claim, in the event of liquidation or dissolution, to the amount of its face value and of any arrears of dividend due and unpaid to it upon the assets of the com-

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STOCK AND STOCKHOLDERS—Continued.

Preferred Stock—Continued.

pany over and above the common stock, but in no case is the preferred stock to be entitled to receive more than its regular six *per cent.* yearly dividend and any arrearages, with interest, that may be due to it on that account, and to the amount of its face value in the event of liquidation or dissolution." The charter contained practically the same provision. Held: Under these provisions "that the corporation had agreed with its preferred stockholders that so long as the corporation did business it would pay or allow to accumulate as a preferred claim a dividend of six *per cent.* (6%) annually and that, when the company ceased to do business, the face value of the preferred stock and any of the dividends unpaid and in arrears were to be paid out of the assets of the corporation in preference to the common stockholders." Drewry-Hughes Co. *v.* Throckmorton, 859.

Both in the charter of a corporation and in the preferred stock certificate issued by it, it was provided that the preferred stock should be entitled to a dividend of six *per cent.* out of the net earnings of the company, and that the claim to such dividend if not earned in any one year was to accumulate and to constitute a preferred charge over the common stock on the income of succeeding years until it was discharged. The import of this language is perfectly clear and under its authority the directors would not be justified in declaring or paying dividends on preferred stock in any one year if not earned, but the dividends which would have been paid, if they had been earned, would remain as a claim upon the earnings of each succeeding year in which earnings were made, to be paid in preference to the common stockholders, as well as the dividends accruing in the succeeding years. It was plainly the intention thus to provide, that so long as the corporation conducted its business and was a going concern the dividends should be guaranteed and cumulative. Drewry-Hughes Co. *v.* Throckmorton, 859.

In the charter of a corporation nothing was said about interest on preferred dividends in arrears and unpaid at the time the company goes into liquidation, while in the certificate of stock reference is made to the fact that in no one case is the preferred stock to be entitled to receive more than its regular six *per cent.* yearly dividend and any arrearages, with interest. A preferred stock dividend bears no interest after liquidation. The rights of the stockholders, both preferred and common, should stand as fixed at the

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STOCK AND STOCKHOLDERS—Continued.

Preferred Stock—Continued.

time the liquidation commenced. The distribution of the assets of the corporation in return to them of their input of capital is not to be regarded as the repayment of a debt or of money loaned. Drewry-Hughes Co. *v.* Throckmorton, 859.

No dividends can be either declared or earned after the corporation ceases to do business. Therefore, the "arrears of dividends due and unpaid," for which the preferred stockholder is given a preference as well as for the face value of his stock, means such unpaid dividends as had accumulated up to the time the corporation ceased to do business or went into liquidation. Drewry-Hughes Co. *v.* Throckmorton, 859.

Preferred stockholders are not creditors of the company, nor are the dividends as to which they may be preferred to be regarded as interest upon a loan. The payments made to the preferred stockholders are dividends. Drewry-Hughes Co. *v.* Throckmorton, 859.

Taxation.—Validity of acts providing for taxation of shares of bank stock. Tresnon *v.* Supervisors, 203.

STREET RAILROADS.

Automobiles.—See *infra*, "Collisions with Vehicles."

Bridges.—*Right to Operate Upon City Bridge.*—A street railway was authorized by an ordinance to operate on Fourteenth street (among others) to the city limits. In consideration of the privileges granted the street railway agreed to pay the city a percentage of its gross receipts. At the south end of Fourteenth street was a bridge which with its approach at the time of the passage of the ordinance was owned by a public utility company. The bridge while thus owned was popularly known as Fourteenth street, and the company operated its railway over the approach and bridge to the city limits. Under the statutes regulating the power of eminent domain the city condemned this bridge and its approach and built a new bridge across the river. Held: That the city had no right to impose a rental or toll charge upon the street railway for the use of the new bridge, and this notwithstanding that the statute authorizing the construction of bridges by the city contained a provision that the city might require compensation of transportation companies for the use of the bridges, and notwithstanding that the company by its charter was subject to all reasonable restrictions, limitations or agreement in operating its railway over bridges across the river imposed by the owners of the bridges. City of Richmond *v.* Va. Ry. & P. Co., 802.

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STREET RAILROADS—Continued.

Collisions with Vehicles.—Collision between taxicab and street car at crossing where taxicab had the right of way. Virginia Railway, etc., Co. *v.* Hill, 397.

In an action by a taxicab passenger against a street railroad for injuries incurred in a collision between a taxicab and a street car, so long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its codefendant. Virginia Railway, etc., Co. *v.* Hill, 397.

Measure of damages. Virginia Railway, etc., Co. *v.* Hill, 397.

Negligence of motorman proximate cause of accident, although driver of taxicab also negligent. Virginia Railway, etc., Co. *v.* Hill, 397.

Negligence of taxicab driver and motorman concurring as proximate causes of accident. Virginia Railway, etc., Co. *v.* Hill, 397.

Refusal to instruct as to duty of taxicab company towards passenger, in action by passenger against street railroad for injuries incurred in collision between street car and taxicab. Virginia Railway, etc., Co. *v.* Hill, 397.

Under a city ordinance a taxicab had the right of way at a crossing over a street car. The trial court instructed the jury that they must give a reasonable application to said ordinance, and that the street cars were not required to stop for vehicles having the right of way, unless in the exercise of ordinary care and prudence a prudent motorman would deem it necessary to stop his car under all the circumstances at the time. Held: A correct interpretation of the ordinance. Virginia Railway, etc., Co. *v.* Hill, 397.

Contributory Negligence of Passenger.—Under the pleading and evidence in this case, the following instruction was appropriate and correctly propounded the doctrine of the last clear chance: "Even though you may believe from the evidence that the plaintiff was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case, if the jury shall further believe from the evidence that the motorman or conductor in charge of the defendant's car saw, or by the exercise of reasonable care and caution in keeping a lookout could have seen, that the plaintiff was in danger of being struck by the rear end of said car, should said car continue around the curve at Fifth and Louisiana streets, and that said motorman and conductor could have stopped said car by the use of ordinary care and caution in

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STREET RAILROADS—Continued.

Contributory Negligence of Passenger—Continued.

time to have prevented the rear end of said car from striking the plaintiff, but failed to do so, then the jury should find for the plaintiff." Virginia Trust Co. *v.* Raymond, 674.

Injury to Fellow Passenger by a Drunken Passenger.—A carrier of passengers owes to all passengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers. Where a passenger in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury complained of to the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident. Virginia R. & P. Co. *v.* Hubbard, 664.

A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen. Virginia R. & P. Co. *v.* Hubbard, 664.

Injury to Passenger Alighting from Car.—In an action for personal injuries to a street car passenger, the declaration contained two counts. The first count charged negligence in not allowing time for the passenger to alight. The second count alleged that the passenger was not allowed a reasonable time after alighting from the car to get out of the way before the car was put in motion. The evidence from the standpoint of a demurrer thereto sustained both counts of the declaration. It showed that after the car had stopped to allow other passengers and the plaintiff to alight, and while plaintiff was in the act of getting off from the front end with one foot on the ground, and was attempting to put the other foot down, the car was prematurely started forward at a rapid rate of speed, and before plaintiff could recover her balance and get out of the way, her clothing was caught by the fender on the rear end of the car as it swung around a curve and overlapped the track, and she was thrown down and seriously injured. Virginia Trust Co. *v.* Raymond, 674.

Instructions.—If one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instru-

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STREET RAILROADS—Continued.

Instructions—Continued.

tion simply tends to benefit the former without unduly inculpating the latter. Virginia Railway, etc., Co. *v.* Hill, 397.

In an action by a taxicab passenger against a street railroad for injuries incurred in a collision between a taxicab and a street car so long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its codefendant. Virginia Railway, etc., Co. *v.* Hill, 397.

Under a city ordinance a taxicab had the right of way at a crossing over a street car. The trial court instructed the jury that they must give a reasonable application to said ordinance, and that the street cars were not required to stop for vehicles having the right of way, unless in the exercise of ordinary care and prudence a prudent motorman would deem it necessary to stop his car under all the circumstances at the time. Held: A correct interpretation of the ordinance. Virginia Railway, etc., Co. *v.* Hill, 397.

Joint Tort-Feasurs.—If one just tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instruction simply tends to benefit the former without unduly inculpating the latter. Virginia Railway, etc., Co. *v.* Hill, 397.

In an action against a street railway by a passenger in a taxicab for injuries incurred by a collision between the taxicab and a street car, the court refused to instruct the jury as to the duty owed by the taxicab company to its passenger. Held: No error, so long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its codefendant. Virginia Railway, etc., Co. *v.* Hill, 397.

Obligation of Contracts.—An ordinance granting the right to a company and imposing a corresponding duty to operate a street railway on the streets of a city, when accepted by the company, constitutes a binding contract, not subject to repeal, and protected against any impairment by the Constitution of the United States. City of Richmond *v.* Va. Ry. & P. Co., 802.

Proximate Cause.—In an action for injuries sustained in a collision between a taxicab and a street car by a passenger in the taxicab, it was held that the evidence was such as to

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STREET RAILROADS—Continued.

Proximate Cause—Continued.

render proper a submission by the trial court to the jury of these three leading questions of fact: (1) Were both defendants guilty of negligence which concurred as proximate causes of the accident? or (2) Was the defendant railway company guilty of negligence which was the sole proximate cause? or (3) Was the taxi company guilty of negligence which was the sole proximate cause? Virginia Railway, etc., Co. *v.* Hill, 397.

Taxicab.—See *infra*, "Collisions with Vehicles."

STREETS AND HIGHWAYS.

Abandonment of Highway.—See CROSSINGS.

Acceptance of Street by Town.—See *infra*, "Dedication."

Adjoining Landowner.—See *infra*, "Obstructions."

Alley.—*Abandonment.*—The law is perfectly well settled that the burden of proof to show an abandonment of an easement is upon the party claiming such abandonment, and that he must establish the fact by clear and unequivocal evidence. Daniel *v.* Doughty, 853.

Adverse Possession.—A suit was brought to judicially determine the existence of an alley-way through certain town lots, and protect the use of the same by a perpetual injunction. It was contended that the bill showed on its face that the land which was sought to be appropriated as an alley-way had been held adversely by the defendants for more than the statutory period of fifteen years. The only allegation in the bill regarding the possession was that the defendants "refuse to open said alley as provided by said deeds and have closed same." How long the alley had been enclosed, and how long the alleged refusal to open it had continued, was not averred. Held: That the demurrer was properly overruled. Daniel *v.* Doughty, 853.

Creation by Deed.—Where a deed duly recorded operates a valid creation and establishment of an alley-way through an entire block, a subsequent purchaser takes subject to it. The deed was in his chain of title, and under familiar rules of law was binding upon him. Daniel *v.* Doughty, 853.

Establishment of Alley by Owner of Block—Section 2510-a, Code of 1904.—The establishment of an alley by the owner of the block before he sold any lots therein did no violence to any of the provisions of section 2510-a, Code of 1904, prescribing the manner of vacating plats of town lots. This statute was not intended, and cannot be construed, to pro-

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STREETS AND HIGHWAYS—Continued.

Alley—Continued.

Establishment of Alley by Owner of Block—Section 2510-a, Code of 1904—Continued.

hibit the creation of new or additional ways or easements, not shown on the original plat. Its manifest purpose and policy is to prevent the diminution of the public uses and conveniences guaranteed in the original plan of subdivision. The consent, properly evidenced, of the owners of the lots affected, is the only prerequisite to the establishment and opening of an alley such as is involved in this case; and subsequent purchasers must take *cum onere*. The closing of a street or alley would, of course, be a different proposition, and controlled by different considerations. Daniel *v.* Doughty, 853.

Bridges.—As a general proposition bridges, constituting extensions of streets, or connecting streets, are to all intents and purposes parts of such streets. City of Richmond *v.* Va. Ry. & P. Co., 802.

Collision of Automobile with Street Car.—See STREET RAILROADS.

Contract for Pavement of Street.—A contractor guaranteed to keep the work done under his contract for pavement of a street in good repair for a period of ten years. Held: That the contractor could not be excused by reason of the settlement of the foundation of the street car tracks on the street causing injury to the work guaranteed, where it appeared that the parties had the subject of the street car tracks upon the streets in mind. Davis *v.* Newport News, 290.

An instruction that the jury before they could find for the city must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant, and if due to causes over which he had no control, he was not liable therefor, was properly refused, where there was no evidence as to causes over which the contractor had no control other than those expressly covered by other instructions. Such an instruction would invite the jury to indulge in mere conjecture as to such causes. Davis *v.* Newport News, 290.

Contributory Negligence.—See *infra*, "Degree of Care Required."

Where plaintiff while riding in a buggy was injured when the buggy struck a telephone wire sagging across the road, which, she, or the person driving her, could have seen if they had been looking for the wire, or looking up and not on the road, the question of plaintiff's contributory negligence was for the jury. Shenandoah Valley, etc., Co. *v.* Murray, 563.

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STREETS AND HIGHWAYS—Continued.

Crossings.—See CROSSINGS.

Dedication.—A survey and map of an unincorporated town was duly recorded and expressly referred to in the act of incorporation of the town thus answering the statutory requirements of Virginia Code 1904, section 1014. An action was brought by plaintiff for personal injuries caused by a defective board walk. The contention on behalf of the town was that the point at which the accident happened was originally an approach built by a railroad to a pleasure pavilion, and not a public street. The contention of the plaintiff was that the board walk was an extension of one of the original streets of the town, and that it had long been constantly used by the public and accepted and maintained by the town as a street. It appeared that the town did some repairing to the sidewalk in question. The case was fairly submitted upon this simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff, and their verdict was approved by the trial court. Held: That the verdict should not be disturbed. Virginia Beach *v.* Ogle, 611.

Degree of Care Required.—Every one has the right to presume that a public highway is in a reasonably safe condition. A traveler on a public street or road, however, is held to the exercise of ordinary care, and what is ordinary care, of course, differs in different situations. Shenandoah Valley, etc., Co. *v.* Murray, 563.

General rule that a pedestrian is required to use ordinary and reasonable care and diligence to avoid danger. Bashford *v.* Rosenbaum Hardware Co., 1.

Pedestrian stepping backward to look in an adjacent window, stepped into a hole in the walk which had been negligently opened behind him. Bashford *v.* Rosenbaum Hardware Co., 1.

Right to assume the way is safe and duty to discover defects. Richmond *v.* McCormack, 552.

Duties and Liabilities of Municipal Corporations.—In an action against a city for personal injuries sustained by reason of tripping over the exposed root of a tree in a sidewalk, the negligence of the city is plainly manifested where the plaintiff's evidence shows that the obstruction was not simply a root over which one might stumble, but was a root fully exposed with branches, one root above another, rising about eight inches above the level of the sidewalk, with an opening like a horseshoe, in which a pedestrian's foot might be caught. Richmond *v.* McCormack, 552.

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STREETS AND HIGHWAYS—Continued.

Duties and Liabilities of Municipal Corporations—Continued.

In an action against a city for personal injuries sustained by reason of an alleged defect in a sidewalk, the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk in question. If by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted and the instructions of the court, which clearly and accurately defined the duty of the city to be "to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exercising reasonable and ordinary care to avoid injury and danger while using the same." Richmond *v.* McCormack, 552.

Evidence.—In an action against a landowner for negligently allowing a telephone wire to sag across a public road, evidence that, as against another landowner, the telephone company claimed to own the wires connecting his house with the line, was inadmissible, it not being shown that the same contract existed between the company and the two landowners, but on the contrary, it appearing that the telephone company did not own the wires in the case at bar. Shenandoah Valley, etc., Co. *v.* Murray, 563.

In an action for damages occasioned by the sagging of a telephone wire, testimony as to the condition of the wire about two months after the accident was admissible within the discretion of the court, in the absence of evidence of any change in the condition, where the lapse of time did not necessarily involve a change in the condition. Shenandoah Valley, etc., Co. *v.* Murray, 563.

In an action for injuries occasioned by the sagging of a telephone wire across a public road, where the landowner allowed the wire installed by a previous owner to remain, testimony that the cost of installing a new 'phone would be less if the wire were allowed to remain was admissible as having a direct bearing upon the question whether the telephone wire was allowed by the landowner to remain across the public road because it was of value to its property. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Grade Crossings.—See CROSSINGS.

Guaranty.—A contractor guaranteed to keep the work done under his contract for pavement of a street in good repair for a

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STREETS AND HIGHWAYS—Continued.

Guaranty—Continued.

period of ten years. Held: That the contractor could not be excused by reason of the settlement of the foundation of the street car tracks on the street causing injury to the work guaranteed, where it appeared that the parties had the subject of the street car tracks upon the streets in mind. Davis *v.* Newport News, 290.

Instructions.— See *infra*, "Duties and Liabilities of Muncipal Corporations."

Refusal of an instruction as to the care to be exercised by a pedestrian in consideration of the darkness, where another instruction given by the court embodied the same proposition of law without emphasizing the darkness. Richmond *v.* McCormack, 552.

Law of the Road.—Collision of street car with automobile. Virginia Railway, etc., Co. *v.* Hill, 397.

Municipal Corporations.— See *infra*, "Duties and Liabilities of Municipal Corporations."

Negligence.—See *infra*, "Duties and Liabilities of Municipal Corporations."

Nuisances.—See *infra*, "Obstructions.'

Obstructions.—Evidence in action for injuries by sagging telephone line. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Telephone Line.—A telephone wire was originally constructed over a public road by and for the accommodation of the former owner of the land. While the defendant after its purchase of the land at no time itself made use of it, the jury were warranted in concluding that the defendant allowed it to remain there because it was of value to its property in view of its being there ready to use. In this situation, the duty rested upon the defendant to use due care to keep the wire in a reasonably safe condition for the public to pass under it. Even though the wire was not a fixture, and for that reason the ownership of it did not pass to defendant, yet since the wire was left to remain over the public road for the benefit of or advantage to the property of defendant, it was its duty to exercise the due care in question, although the wire at the point at which it became a nuisance was not the property of defendant. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Where the defendant knew that a telephone wire was sagging over a public road, resulting from its own act in unfastening it from a porch, in ample time to have abated

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STREETS AND HIGHWAYS—Continued.

Obstructions—Continued.

Telephone Line—Continued.

the nuisance before an accident occurred or by the exercise of reasonable care it could have so known, it was guilty of negligence in not abating the nuisance. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Where there was testimony that defendant's employees painted a house to which a telephone wire was attached, that immediately before the painting the wires were securely fastened to the porch of the house, and, that they were seen immediately after such painting to be unfastened from the porch and the ends loosely wrapped around a tree, the jury were warranted in concluding that the unfastening was done by defendant's employees, no other agency being shown in evidence. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Where plaintiff while riding in a buggy was injured when the buggy struck a telephone wire sagging across the road, which she, or the person driving her, could have seen if they had been looking for the wire, or looking up and not on the road, the question of plaintiff's contributory negligence was for the jury. Shenandoah Valley, etc., Co. *v.* Murray, 563.

Presumptions and Burden of Proof.—Every one has the right to presume that a public highway is in a reasonably safe condition. A traveler on a public street or road, however, is held to the exercise of ordinary care, and what is ordinary care, of course, differs in different situations. Shenandoah Valley, etc., Co. *v.* Murray, 563.

The general rule is that a traveler has a right to assume that a street is in a reasonably safe condition. Richmond *v.* McCormack, 552.

Private Ways.—See PRIVATE WAYS.

Questions of Law and Fact.—What is ordinary and reasonable care by a pedestrian, a question of fact for the jury. Bashford *v.* Rosenbaum Hardware Co., 1.

Remedy Against Encroachment, Obstruction or Nuisance.—See *infra*, "Obstructions."

Telephone Wire Obstructing the Street.—See *infra*, "Obstructions."

SUBROGATION.

Nature of the Doctrine.—The doctrine of subrogation has nothing of form or technicality about it. It is the creature of equity, and essential justice is its object. Baugh & Sons Co. *v.* Black, 12.

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SUBROGATION—Continued.

Necessity for Payment of Debt.—As a general rule, before a surety is entitled to be subrogated to the rights of the creditor against the principal debtor, he must have actually paid or satisfied the debt, but, where the rights of the parties are clear, a court of equity, in carrying out the principles underlying and constituting the doctrine of subrogation, will take the shortest road to the right and justice of the case. Baugh & Sons Co. *v.* Black, 12.

Where the principal's lands have been sold and the proceeds are under the control of the court, and the court will not do the vain thing of selling the lands of the surety and then granting him subrogation. Baugh & Sons Co. *v.* Black, 12.

SUIT. See ACTIONS.

SURETYSHIP.

Extension of Time to Principal.—See BILLS, NOTES AND CHECKS.

Parol Evidence.—A deed of trust to secure a joint bond of father and son provided that the trustee should sell first the lands conveyed by the father "and if a sufficient amount is derived to pay the debt and costs, will not make further sale." Held: That while this clause was a circumstance tending to show that the father was the principal debtor, it might be shown from other parts of the deed and by extrinsic evidence that as between themselves, each was a principal as to one-half of the debt and a surety as to the other half. Baugh & Sons Co. *v.* Black, 12.

Subrogation.—See SUBROGATION.

TAXATION.

Assessment.—Constitutionality of act of March 22, 1916, limiting time within which omitted taxes may be assessed. Com. *v.* United Cigarette M. Co., 835.

Interest on Omitted Taxes.—See *infra*, "Interest."

Banks and Banking.—The act of February 28, 1890 (Acts 1889-90, p. 111), amended by Acts 1902-3-4, p. 431 (section 1040-a of Code, 1904), providing for the taxation of shares of stock issued by banks located in counties and cities, is constitutional. Tresnon *v.* Supervisors, 203.

The bank act, Acts 1915, p. 209, and section 1040-a, Code 1904, are harmonious, and, when read together, constitute the law of the State touching the assessment and taxation of shares of bank stock. Under these acts shares of stock in city banks owned by residents of a county are properly taxable in the county. Tresnon *v.* Supervisors, 203.

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TAXATION—Continued.

Banks and Banking—Continued.

The uniformity requirement of section 168 of the Constitution is not affected by the fact that stock in a city bank is taxed by the city against resident holders thereof at a higher rate than it is taxed by an adjacent county against residents of such county. Tresnon *v.* Supervisors, 203.

Bonds.—The tax on deeds of trust and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages. Virginia Blue Ridge Ry. *v.* Kidd, 426.

Business.—When is a non-resident engaged in business within the State. Jamison *v.* Commonwealth, 137.

Collection of Taxes.—*Interest on Omitted Taxes.*—See *infra*, "Interest."

Constitutional Law.—*Due Process of Law—Vested Rights.*—The act of March 22, 1916, referred to in the first headnote, is not unconstitutional as depriving the political divisions of the State of property without due process of law. The incipient right to assess omitted property, as conferred by section 508, Code 1904, does not fall within the meaning of a vested property right as recognized by the authorities. The mere existence of a general law which might have been availed of to reduce to a state of property an incomplete right, affords to those who have not perfected their rights thereunder no ground for complaint against a change of the law. There must be something more than a mere expectation based upon anticipation of the continuance of present general laws. Com. *v.* United Cigarette M. Co., 835.

Exemptions.—The act of March 22, 1916, is not an exemption from taxation within the meaning of section 183 of the Constitution. Com. *v.* United Cigarette M. Co., 835.

Impairment of Obligation of Contracts.—Nor is the act of March 22, 1916, invalid as impairing the obligation of contracts. Com. *v.* United Cigarette M. Co., 835.

Refunding Taxes—Special and Private Law.—The Constitution of Virginia, section 63, clause 8, forbids special laws remitting or releasing any obligation or liability of any person, corporation or association to the State or to any political sub-division. As no one rests under any obligation or liability to pay taxes on property expressly exempted by the Constitution, this provision has no application to a statute refunding such tax. Nor has section 63, clause 18, of the Con-

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TAXATION—Continued.

Constitutional Law—Continued.

Refunding Taxes—Continued.

stitution, which prohibits granting to any private corporation, association or individual any special, or exclusive right, privilege or immunity, any application to such an act. Commonwealth *v.* Ferries Co., 827.

Refund of Taxes.—In the absence of constitutional limitation upon its powers, the right of the legislature to refund taxes paid, even though voluntarily paid, is unquestioned. Although the legislature may not be compellable to refund an amount so paid, it may do so without compulsion. Such acts are not infrequent; and it is settled law that a valid appropriation may be made to discharge a merely moral obligation. Commonwealth *v.* Ferries Co., 827.

Section 64 of the Virginia Constitution.—The act of March 22, 1916, does not violate section 64 of the Virginia Constitution against the surrender or suspension, by either general or special law, of the right and power of the State or any political sub-division thereof to tax corporations or corporate property. It is manifest upon a reading of section 64 that the prohibition in question was intended to prevent the extension of favors and discriminations in favor of corporations as against individuals. Com. *v.* United Cigarette M. Co., 835.

Section 174 of the Constitution.—Section 174 of the Constitution providing that the failure to assess property for taxation shall not defeat a subsequent assessment for and collection of taxes for any preceding years, cannot properly be construed to mean that the legislature may not validly impose a time limit within which county or district assessments for back taxes must be made. The failure to assess for taxation cannot defeat a subsequent assessment for county and district taxation, but the subsequent assessment must be made in the manner and within the time prescribed by law. Com. *v.* United Cigarette M. Co., 835.

Special Laws—Refunding Tax.—Section 64 of the Constitution provides: "* * * no private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual." And sections 567 and 568, Code of 1904, furnish remedies for the correction of erroneous assessment of taxes. Notwithstanding these provisions, the legislature is not deprived of the power of refunding by special act taxes illegally collected. "The claim is of a class that peculiarly falls

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TAXATION—Continued.

Constitutional Law—Continued.

Special Laws—Refunding Tax—Continued.

within the administrative department of the legislature and it would be unwise and inconvenient by a too narrow construction of section 64, to deprive the legislature of its exercise of a power which existed long before the adoption of the present Constitution in which this provision appears for the first time." Commonwealth *v.* Ferries Co., 827.

Special or Private Law—Refunding Taxes.—Nor does the Constitution require that the illegality of the tax shall be judicially determined before the legislature may act. Commonwealth *v.* Ferries Co., 827.

Special or Private Law—Refunding Taxes.—Section 63, clause 9, of the Constitution of Virginia, prohibits the legislature from refunding by private act money lawfully paid into the treasury. But the Constitution imposes no limitation upon the power of the legislature to refund money unlawfully paid or collected. The fact that the Constitution in terms prohibits the one and is silent as to the other, creates a strong presumption that it was not intended to trench upon the absolute control of the legislature in its management of the business of the State with respect to refunding money unlawfully paid into the treasury. Commonwealth *v.* Ferries Co., 827.

Special or Private Laws.—The act is not a "local, special or private law," but applies alike to all persons, both natural and artificial, and to all municipalities, counties and districts situated similarly to those involved in this case; and it is not, therefore, in contravention of section 63 of the Constitution of Virginia against the enactment of local, special and private laws. The fact that it happens to redound to the special benefit of certain persons and against the interests of certain localities does not make it a special or local law within the meaning of the Constitution. Com. *v.* United Cigarette M. Co., 835.

Uniformity.—The act of March 22, 1916, does not violate section 168 of the Constitution. Com. *v.* United Cigarette M. Co., 835.

Validity of Limitation on Time within which Omitted Taxes May be Assessed.—Code of 1904, section 508, as amended by act of March 22, 1916, chapter 491, section 1, sub-section 2, page 826, providing that, "No municipal, county or district tax shall be levied or collected on any assessment of intangible personal property, money or incomes for taxes alleged to have been omitted from the assessments for the

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TAXATION—Continued.

Constitutional Law—Continued.

Validity of Limitation on Time within which Omitted Taxes May be Assessed—Continued.

years prior to nineteen hundred and twelve," is constitutional. This amendment to section 508 was intended as a statute of repose, and while it may result in releasing some just obligations and in permitting some intentional wrongdoers to escape taxation which ought to have been imposed upon them, the purpose of the amendment was a just one and the result, in the main, is for the public good. Com. *v.* United Cigarette M. Co., 835.

Construction of Tax Acts.—See *infra*, "Strict Construction."

Counties.—Action of assumpsit by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

Deeds of Trust.—See *infra*, "Mortgages and Deeds of Trust."

Equality and Uniformity.—The act of March 22, 1916, limiting time within which omitted taxes may be assessed, does not violate the provision against equality and uniformity. Com. *v.* United Cigarette M. Co., 835.

Exemption.—The act of March 22, 1916, limiting time within which omitted taxes may be assessed, is not an exemption from taxation. Com. *v.* United Cigarette M. Co., 835.

Interest.—Statutes will not be given a retrospective effect except in cases where such effect was plainly intended by the legislature. This rule applies peculiarly to the laws relating to assessment of property which has been omitted from taxation, the rule being that such assessments are to be made according to the law in force at the time the assessment should have been made. Consequently, where a statute forbade the charge of interest on taxes omitted through no fault of the taxpayer, was subsequently amended allowing the addition of interest in all cases of omitted taxes, the amendment should not be construed to apply retrospectively. Com. *v.* United Cigarette M. Co., 835.

Where the evidence was sufficient to warrant the court in finding that the failure of the defendant in error to make a proper return was due to an honest belief that its intangible property was not subject to taxation because it was a foreign corporation, the court was right in holding that no interest should be charged on omitted taxes, under section 508, Code of 1904, providing that where the omission was due to "no fault of the person charged with the tax no in-

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TAXATION—Continued.

Interest—Continued.

terest shall be charged" Com. *v.* United Cigarette M. Co. 835.

Mistake.—Action of assumpsit by city against county to recover taxes paid through mistake to county. Norfolk *v.* Norfolk County, 356.

Mortgages and Deeds of Trust.—The tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages. Virginia Blue Ridge Ry. *v.* Kidd, 426.

Municipal Corporations.—See MUNICIPAL CORPORATIONS.

Non-Residents—Section 9 of the Acts of March 17, 1915, p. 163.—The right to tax under the statute loans by a non-resident who has neither domicile, place of business nor an agent in this State, but who, upon applications to him outside of the State, lends money secured by liens on real estate in the State, and keeps the evidences of debts at his place of residence outside the State. Such non-resident is not conducting a business in the State within the meaning of the act, although from time to time he enters the State to inspect the lands upon which he has made or is about to make loans. Jamison *v.* Commonwealth, 137.

Presumption of Knowledge of Law.—In a sense, and as a general rule, it is true that every man is presumed to know the law, and that ignorance of it furnishes no excuse; but when the legislature provided for the remission of interest on taxes omitted from assessment through "no fault" of the taxpayer, it must have meant to recognize a difference between omissions due to wilful and conscious wrongdoing and cases due to honest misapprehension and misconstruction of the tax laws. Com. *v.* United Cigarette M. Co., 835.

Recovery of Taxes Paid.—In the absence of constitutional limitation upon its powers, the right of the legislature to refund taxes paid, even though voluntarily paid, is unquestioned. Although the legislature may not be compellable to refund an amount so paid, it may do so without compulsion. Such acts are not infrequent; and it is settled law that a valid appropriation may be made to discharge a merely moral obligation. Commonwealth *v.* Ferries Co., 827.

The general rule is well settled that taxes voluntarily paid cannot be recovered back in the absence of a statute providing for their repayment. The rule, of course, does not apply

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TAXATION—Continued.

Recovery of Taxes Paid—Continued.

where repayment is made pursuant to a valid statute. Commonwealth *v.* Ferries Co., 827.

Refunding Taxes.—See *infra*, "Constitutional Law."

Retrospective Laws.—Statutes will not be given a retrospective effect except in cases where such effect was plainly intended by the legislature. This rule applies peculiarly to the laws relating to assessment of property which has been omitted from taxation, the rule being that such assessments are to be made according to the law in force at the time the assessment should have been made. Consequently, where a statute forbade the charge of interest on taxes omitted through no fault of the taxpayer, was subsequently amended allowing the addition of interest in all cases of omitted taxes, the amendment should not be construed to apply retrospectively. Com. *v.* United Cigarette M. Co., 835.

Stock and Stockholders.—Validity of acts providing for taxation of shares of bank stock. Tresnon *v.* Supervisors, 203.

Strict Construction.—Laws imposing taxes are strictly construed, and whenever there is a doubt as to the meaning or scope of such laws they are construed most strongly against the government and in favor of the citizen. Jamison *v.* Commonwealth, 137.

Subjects of Taxation.— *Non-Residents.*—See *infra*, "Non-Residents."

TAXICAB.

Collision with Street Car.—See STREET RAILROADS.

TELEGRAPHS AND TELEPHONES.

Interstate Commerce.—Telegraph and telephone companies are common carriers under the express provisions of the act of Congress to regulate commerce. Western U. Tel. Co. *v.* Bolling, 413.

The transmission of intelligence by wire is commerce, either State or interstate. Western U. Tel. Co. *v.* Bolling, 413.

The transmission of telegraphic messages between points within the State, which, in the course of their transmission, pass without the State into another State, or the District of Columbia, is interstate commerce. Western U. Tel. Co. *v.* Bolling, 413.

Where a telegraphic message between two points in the State is transmitted to a point without the State and from there relayed to the point of delivery within the State, this

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TELEGRAPHS AND TELEPHONES—Continued.

Interstate Commerce—Continued.

constitutes interstate commerce, although it was possible to have sent the message between the two points without its leaving the State. Western U. Tel. Co. *v.* Mahone, 422.

Where telegraph companies undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, these conditions, until disapproved by the Interstate Commerce Commission, furnish the exclusive rules for determining their liability, subject to the federal statutes and general law, any State statute to the contrary notwithstanding. Western U. Tel. Co. *v.* Bolling, 413.

Whether the statutory penalty (Code, 1904, section 1294-h, clauses 5, 6) may be enforced in clear cases of negligence occurring within this State where the message is interstate commerce. Western U. Tel. Co. *v.* Bolling, 413.

Limitation of Liability.—Where telegraph companies undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, these conditions, until disapproved by the Interstate Commerce Commission, furnish the exclusive rules for determining their liability, subject to the federal statutes and general law, any State statute to the contrary notwithstanding. Western U. Tel. Co. *v.* Bolling, 413.

Obstructing Streets and Highways.—See STREETS AND HIGHWAYS.

TELEPHONES. See TELEGRAPHS AND TELEPHONES.

TENANT. See LANDLORD AND TENANT.

TORTS.

Joint Tort-Feasors—If one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except; but not when the instruction simply tends to benefit the former without unduly inculpating the latter. Virginia Railway, etc., Co. *v.* Hill, 397.

In an action against a street railway by a passenger in a taxicab for injuries incurred by a collision between the taxicab and a street car, the court refused to instruct the jury as to the duty owed by the taxicab company to its passenger. Held: No error. So long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its codefendant. Virginia Railway, etc., Co. *v.* Hill, 397.

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TOWNS. See MUNICIPAL CORPORATIONS.

TRADE SECRETS.

Where one originated an idea or scheme of banking, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind. Stein *v.* Morris, 390.

Where one plan of banking is operated upon a mutual basis, the members or borrowers subscribing to the capital stock and participating in the profits and losses; while the other is operated upon a fixed capital, the stockholders being the managers and proprietors of the banking institution, and the borrowers and savers not participating in the profits and losses, the two plans are not substantially similar. Stein *v.* Morris, 390.

TRESPASS.—See TRESPASS ON THE CASE.

TRESPASS ON THE CASE.

Warranty.—Case is the proper remedy for breach of warranty as to the sale of personal property. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Either an action on the case sounding in tort or assumpsit will lie for a false warranty. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

TRUST DEED. See MORTGAGES AND DEEDS OF TRUST.

TRUSTS AND TRUSTEES. See EXECUTORS AND ADMINISTRATORS; MORTGAGES AND DEEDS OF TRUST.

Care to be Exercised by Trustee.—Nothing more is in general required of an executor or trustee than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. Shepherd *v.* Darling, 586.

Compensation of Trustee.—Testator gave his executor certain bank stock in trust, and also gave him the sum of $500 as compensation for his services. The executor was the testator's intimate personal friend and legal adviser who drew the will. Notwithstanding this specific bequest of $500 as compensation for his services, the executor colected five *per cent.* commission on the first $300 and two *per cent.* commission on the remainder of the book valuation of the bank stock. He also collected five *per cent.* on most but not all of the dividends

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TRUSTS AND TRUSTEES—Continued.

Compensation of Trustee—Continued.

paid to him under the trust. Held: That this interpretation of the will by the executor was entitled to no small consideration; and, that what would appear to be the correct interpretation of the will had been put into practical effect by the man whom the testator trusted with its preparation and execution. No further allowance based upon the increased value of the stock at the end of the trust should be allowed. Williams *v.* Bond, 678.

When a testator fixes the compensation for an executor or trustee under his will, and the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little as the testator has fixed. In cases where the language of the testator is susceptible of more than one construction, the question becomes one of interpretation which the courts must settle by ascertaining the probable intention and understanding of the parties. Where no compensation at all is named in the will, the rule is that the allowance shall be reasonable, being usually five *per cent.* on receipts, subject to increase or reduction of this rate under peculiar circumstances. Williams *v.* Bond, 678.

Deeds of Trust.—See MORTGAGES AND DEEDS OF TRUST.

Equitable Liens.—See LIENS.

Executors and Administrators.—See EXECUTORS AND ADMINISTRATORS.

Joint or Several Contracts.—An express contract of three of the beneficiaries of a trust estate to make the corpus of the estate a security for appellant's debt is a joint contract. Brown *v.* Ford, 233.

Jurisdiction of Equity.—Where a court of equity in three chancery causes has taken the management and control of the whole corpus of a trust estate and in a fourth cause has taken jurisdiction to partition and distribute the realty and personalty of the estate, the court has unquestionable primary jurisdiction as a court of equity of a claim against one of the beneficiaries to the extent that such claim is an equitable lien on his interest in the estate under the control of the court. Brown *v.* Ford, 233.

Where the contingent interest of a deceased beneficiary before the death of the life tenant was vested in a claimant, charged by the agreement with the payment of the deceased beneficiary's liabilities, and this agreement was embodied in a consent decree of a chancery court entered in pending suits for the settlement and division of the trust estate, the chan-

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TRUSTS AND TRUSTEES—Continued.

Jurisdiction of Equity—Continued.

cery court had primary jurisdiction of appellant's claim against the deceased beneficiary. Brown *v.* Ford, 233.

Resort to Court for Direction and Advice.—Where property is held under a trust by his testator at the time of his death, which vested in him no discretion as to the time or manner of its disposition, an executor is charged with the duty of "executing the trust or so much thereof as remained unexecuted," under the provisions of section 3419 of the Code, and where a difference of opinion arises between him and the beneficiaries of the trust as to what were the rights of his testator in the matter of compensation, he may seek the aid and advice of a court of equity as to the respective rights of the parties. The subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the executor followed a recognized and approved practice in seeking the aid and advice of a court of equity. Williams *v.* Bond, 678.

Right to apply for instruction. Shepherd *v.* Darling, 586.

Trustee Dealing with Beneficiary.—Where a beneficiary dealing with the trustee has sought and obtained independent advice from a person competent to advise as to the particular transaction, this fact will go far to give assurance of its fairness and to induce a court of equity to uphold it. Shepherd *v.* Darling, 586.

UNFAIR COMPETITION. See TRADE SECRETS.

USURY.

Banks and Banking.—See *infra*, "National Banks."

Interpretation of Statutes.—The common-law rule in favor of letting stand undisturbed payments of the principal actually lent and of legal interest actually made, not held to be changed, except to the extent that the provisions of the statute law plainly make the change. Baker *v.* Lynchburg Nat. Bank, 208.

Limitation of Actions.—Limitation of time within which defense, given by section 5198, U. S. Revised Statutes, may be made by debtor. Baker *v.* Lynchburg Nat. Bank, 208.

The period of limitation upon the time within which suit must be brought to recover the penalty under section 5198 of U. S. Revised Statutes, begins to run from the date of each payment of interest and not from the payment of the whole debt. Baker *v.* Lynchburg Nat. Bank, 208.

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USURY—Continued.

National Banks.—Action for penalty under section 5198 of U. S. Revised Statutes. Baker *v.* Lynchburg Nat. Bank, 208.

In actions to recover the penalty given by section 5198, U. S. Revised Statutes, the two-year period of limitation begins to run from each actual payment of usurious interest. Baker *v.* Lynchburg Nat. Bank, 208.

In case of such payment of interest as is a usurious transaction under section 5198, U. S. Revised Statutes, *i. e.*, where the payment is at a rate greater than allowed by law—double the whole amount paid, legal as well as illegal interest, may be recovered. Baker *v.* Lynchburg Nat. Bank, 208.

Limitation of time within which defense, given by section 5198, U. S. Revised Statutes, may be made by debtor. Baker *v.* Lynchburg Nat. Bank, 208.

Payment of interest on renewal notes. Baker *v.* Lynchburg Nat. Bank, 208.

Remedy for illegal interest paid or reserved. Baker *v.* Lynchburg Nat. Bank, 208.

The period of limitation upon the time within which suit must be brought to recover the penalty under section 5198 of U. S. Revised Statutes, begins to run from the date of each payment of interest and not from the payment of the whole debt. Baker *v.* Lynchburg Nat. Bank, 208.

Usurious interest paid to a national bank cannot be deducted from, or—what is the same thing—applied to the principal of the debt in an action by the creditor against the debtor; the remedy for recovery of usurious interest actually paid being an action under section 5198, U. S. Revised Statutes, to recover the penalty provided for thereby, and only that action, such remedy being made an exclusive remedy by such statute. Baker *v.* Lynchburg Nat. Bank, 208.

Payment of a Bonus to Lender is Usury.—Baker *v.* Lynchburg Nat. Bank, 208.

Penalty.—See *infra*, "National Banks."

VARIANCE.

Appeal and Error.—Section 3384 of the Code of 1904, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would have been presented in the trial court if the question first raised on appeal had been raised there. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke

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VARIANCE—Continued.

Appeal and Error—Continued.

it, the defendant cannot upon appeal take advantage of the irregularity which the statute would have cured. Conrad *v.* Ellison-Harvey Co., 458.

Larceny.—An indictment alleged the larceny of money by false pretenses, whereas the proof showed the larceny of a check afterwards cashed by defendant. Held: That in every real sense money was paid to the accused, and, therefore, the charge in the indictment was substantially proven. Lewis' Case, 875.

Upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment. Lewis' Case, 875.

VENDOR AND PURCHASER. See DEEDS; SALES.

Infants' Lands.—See INFANTS.

Mistake in Quantity.—In contracts of sale by the acre, a court of equity holds the vendor liable for a deficiency on the ground of mistake. Motley *v.* Hodges, 498.

VERDICT.

Conflicting Evidence.—See NEW TRIALS.

Cure by Verdict.—See AMENDMENTS.

New Trials.—See NEW TRIALS.

Remittitur.—See REMITTITUR.

Verdict Contrary to the Evidence.—See NEW TRIALS.

WAIVER.

Jury.—Under section 3166, Pollard's Code 1904, a trial by jury is waived if neither plaintiff nor defendant demand such trial. But Acts of 1912, p. 133, governing proceedings to determine boundaries specifically provides that a "trial by jury may be waived by consent of parties," and therefore requires a trial by jury in every case arising under it, unless such trial is waived by the consent of parties both plaintiff and defendant. Collier *v.* Hiden, 453.

WARRANT OF ATTORNEY TO CONFESS JUDGMENT. See CONFESSION OF JUDGMENTS.

WARRANTY. See GUARANTY.

Assumpsit.—Either an action on the case sounding in tort or assumpsit will lie for a false warranty. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

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WARRANTY——Continued.

Election of Remedies.—Where an action is based upon a breach of warranty, the purchaser may, if he chooses, waive the tort and sue upon the contract, or waive the contract and sue in tort. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Implied Warranty.—The seller of roofing, knowing that the roofing was intended for buildings required to be water-tight, implied guarantees that such roofing is water-tight. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

When one sells an article of personal property, there is an implied guarantee that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it is to be put. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Where in the contract of sale of roofing the vendor undertook in case the roof should leak, that he would make repairs, a guaranty is necessarily implied that the roof would not leak. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Instructions.—In an action for breach of warranty the jury, while considering their verdict, returned to the court room and asked whether or not they were limited in deciding the case to the typewritten guarantee introduced in evidence. The court replied that they were not; that they "must take into consideration the oral evidence, the letters and written guarantee, and to decide from all the evidence what the contract was and a breach of it, if any, and the damages, if any." The typewritten guarantee was only a part of the evidence, but a material part, to be interpreted in the light of the circumstances under which it was given, the letters contemporaneously and subsequently written, the construction put upon it by the parties themselves, and the pertinent oral evidence indicating a breach or lack of breach. As the court could not have made any complete reply to the question without fully reinstructing the jury upon all the questions involved in the case, the reply of the court was not harmful. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Parol Evidence.—Testimony which does not seek to vary or contradict a written guaranty, but which accords with it, showing the attending circumstances, the construction placed upon it by the parties and their subsequent conduct with reference thereto is admissible. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Remedy for Breach of Warranty.—Either an action on the case sounding in tort or assumpsit will lie for a false warranty. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

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WARRANTY——Continued.

Scienter.—Whether the declaration be in assumpsit or tort it need not aver a scienter. And if the averment be made it need not be proved. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Trespass on the Case.—Case is the proper remedy for breach of warranty as to the sale of personal property. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

Either an action on the case sounding in tort or assumpsit will lie for a false warranty. Standard Paint Co. *v.* E. K. Vietor & Co., 595.

WATERS AND WATERCOURSES.

Damages.—Where a dam causes permanent injuries to another's land, the measure of damages is the difference in the market value of the land with and without the dam, to be computed as of the time immediately before the dam was built and immediately after it was finished and filled with water. Norfolk Co. Water Co. *v.* Etheridge, 379.

Where the flooding of plaintiff's land is caused by a dam which is a permanent structure, there can be but one recovery for such injury, and the damages should include all damages sustained, both past and future. Norfolk Co. Water Co. *v.* Etheridge, 379.

Drainage.—See DRAINS AND SEWERS.

Embankments and Bridges.—Right of railroad to change its location along a watercourse, and to construct its embankments to protect its roadbed from injury by accidental and extraordinary floods, where as a result the property of other riparian owners is injured by such floods. Ches. & O. R. Co. *v.* Meriwether, 55.

Limitation of Actions.—Limitation where there is a permanent pollution of the stream. Magruder *v.* Va.-Car. Chem. Co., 352.

Limitation where there is a permanent pollution of the stream. Norfolk Co. Water Co. *v.* Ethridge, 379.

Obstructions.—General rule as to.—Ches. & O. R. Co. *v.* Meriwether, 55.

Where because of a dam which is a permanent structure plaintiff's land was flooded, there can be but one recovery, which would include all the damage sustained, both past and future. Norfolk Co. Water Co. *v.* Etheridge, 379.

Pollution.—Evidence held not sufficient to entitle plaintiff to recover for pollution of stream. Magruder *v.* Va-Car. Chem. Co., 352.

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WATERS AND WATERCOURSES—Continued.

Pollution—Continued.

Evidence held not to establish a case for perpetual injunction and decree for damages. Magruder *v.* Va.-Car. Chem. Co., 852.

Laches. Magruder *v.* Va.-Car. Chem. Co., 852.

WAY OF NECESSITY. See PRIVATE WAYS.

WAYS. See PRIVATE WAYS.

WILLS.

Construction.—Construed to favor vested rather than contingent remainders. Cottrell *v.* Mathews, 847.

Questions of law and fact. Ewell *v.* Brock, 475.

Weight to which practical construction by an executor who was the legal adviser and intimate friend of testator is entitled. Williams *v.* Bond, 678.

Words of Survivorship.—See *infra*, "Words of Survivorship."

Lost Instruments and Records.—Jurisdiction of equity to set up lost will. Dunnavant *v.* Dunnavant, 301.

Parol Evidence.—Parol evidence to determine the subject of devise where there is a latent ambiguity. Ewell *v.* Brock, 475.

Question of Law and Fact.—Interpretation and construction of will. Ewell *v.* Brock, 475.

Remainders.—*Vested and Contingent Remainders.*—A will should be construed to favor vested rather than contingent remainders. Cottrell *v.* Mathews, 847.

Subject of Devise.—A testator in his will devised to his daughter "the farm on which I now reside." The residence of the testator was on a farm which he had acquired about thirty-five years before his death, known as Morris Neck, containing about sixty acres. About fourteen years prior to his death he purchased an adjoining farm, known as the Cooper tract, containing about thirty acres. The question before the court below was whether the Cooper tract passed under the above devise. This was clearly a case of latent ambiguity, the language in question containing a description which was equally applicable to two objects, namely, the farm consisting of the Morris Neck tract alone or the farm consisting of the two tracts. Parol evidence was essential to remove this uncertainty, and the question of identity of the subject-matter of the devise was a question of fact for the jury and not for the court. Ewell *v.* Brock, 475.

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WILLS—Continued.

Words of Survivorship.—A will contained the following clause: "At the death of my wife, it is my will that my estate be equally divided between my surviving children, share and share alike." Held: That the words of survivorship in the will referred to the testator's death and not to his wife's death. Cottrell *v.* Mathews, 847.

Words of survivorship in a will are to be construed to relate to the testator's death rather than to that of a life tenant, unless a contrary intent clearly appears. Cottrell *v.* Mathews, 847.

WITNESSES.

Cross-Examination.—A buyer testified that owing to delay in delivery he had been obliged to buy another engine in place of the one contracted for with the seller. Upon cross-examination he was asked what price he paid for this engine. This question was proper, both to show the entire transaction, part of which had been introduced in the interest of the buyer, as well as to show the motive which might have possibly influenced the buyer in repudiating his contract. Lawson *v.* Hobbs, 690.

Expert Witnesses.—See EXPERT AND OPINION EVIDENCE.

Impeachment.—Contradictory statements of the grantor of a deed of trust as to the consideration of the deed supply no affirmative proof tending to show that such consideration was lacking. Murphy's Hotel Co. *v.* Herndon's Admr., 505.

Memorandum.—Plaintiff, in testifying to the value of the personal property, used an inventory of the articles destroyed. This inventory was prepared in part from information derived from other persons. As the inventory was not introduced or relied on as evidence, but was used as a memorandum by the witness while testifying before the jury, an exception to its use was without merit. C. & O. R. Co. *v.* May, 790.

Opinion of Witness.—See EXPERT AND OPINION EVIDENCE.

WORDS AND PHRASES.

"At Once." Lawson *v.* Hobbs, 690.

"Business." Jamison *v.* Commonwealth, 148.

"Employed." A. C. L. R. Co. *v.* Tredway's Admx., 735.

"Employee." A. C. L. R. Co. *v.* Tredway's Admx., 735.

"Expenses." Cary *v.* Holt's Ex'ors, 261.

F. O. B. Lawson *v.* Hobbs, 690.

"Kindred." Bonewell *v.* Smith, 431.

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WORDS AND PHRASES—Continued.
"On." Forest V. L. Co. *v.* Atlantic, etc., R. Co., 808.
"Policy." Shepherd *v.* Va. State Ins. Co., 383.
"Railroad works." Forest V. L. Co. *v.* Atlantic, etc., R. Co., 808.
"Reasonable time." See REASONABLE TIME.
"Ultimate facts." Klaff *v.* Virginia R., etc., Co., 847.

WORKING CONTRACTS.
Contract for Pavement of Street.—See STREETS AND HIGHWAYS.

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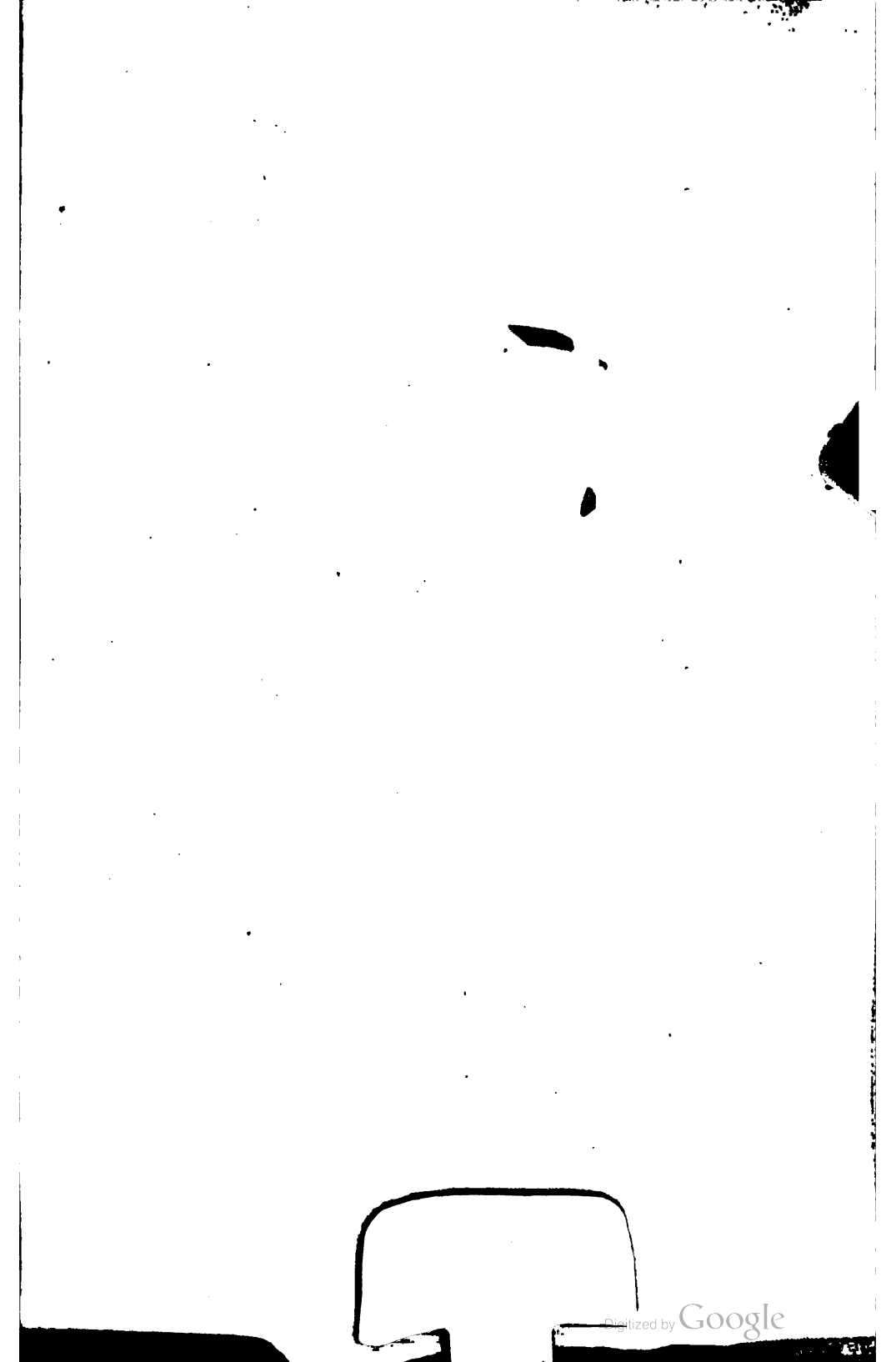
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